SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 118

ALBERT RALPH PETTI, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. a]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALBERT RALPH PETTI and CHARLES SOLOMON ROSENBERG, Defendants

DOCKET ENTRIES

1947

Dec. 18. Petti fined $2,500.

Sept. 30. Filed indictment (ordered sealed).

Oct. 17. Indictment ordered opened—Rifkind J.

Oct. 20. Filed petition for Writ of Habeas Corpus an prosequendum for defendant Rosenberg.

Oct. 20. Issued Writ returnable 10/24/47.

May 19. Filed bail bond dated 4/25/47 for $2,500. Manuf. Cas. Ins. Co. Docketed 10/22/47.

Oct. 24. Albert Petti—Pleads not guilty, bail continued. Charles Rosenberg—Pleads not guilty (Produced on Writ).

Oct. 24. Filed order to detain Charles Solomon Rosenberg at Det. Hdgtrs., N. Y. C. until conclusion of trial. Rifkind J.

[fol. b] Nov. 5. Filed Notice of Appearance by Irving Mendelson, Atty., 217 Broadway, for defendant C. S. Rosenberg.

May 12. Filed Warrant for removal from So. Dist., of Ohio, writ executed. Deft. delivered to So. Dist. of N. Y. 4/23/47.

Nov. 26. Filed petition for Writs of Habeas Corpus and issued Writs (ad testifi candum) for Roosevelt G. Cash, Leo Thompson, Theodore T. Hope, and James A. Jones. Returnable 12/8/47.

Dec. 8. Filed order that U. S. Marshall commit Roosevelt G. Cash, Leo Thompson, Theodore T. Hope and James A. Jones to Det. Hdqtrs., N. Y. C. until conclusion of trial, etc.—Bright J.

Dec. 8. Charles S. Rosenberg—pleads guilty, attorney present. Sentence adjourned until 12/15/47. Remanded. Bright J.

Dec. 8. Trial began as to Deft. Albert R. Petti before Adair J.

Dec. 9. Trial continued.

Dec. 10. Trial continued and Govt. rests motions made and denied.

Dec. 11. Trial continued and concluded.

Verdict—not guilty on Count One. Guilty on Count Two. Sentence adjd. until 12/17/47. Bail contd. Adair J.

Dec. 17. Filed judgment. Chas. S. Rosenberg—Three years on Counts 1 and 2 to run concurrently, at a place of confinement to be designated by the Attorney General of the United States and concurrently with sentence. Deft. is now serving at New Jersey State Prison. Remanded. Adair J.

Dec. 17. Issued commitment in triplicate for Chas. S. Rosenberg.

Dec. 17. Motion to set aside and dismiss as to deft. Petti —denied. Adair J.

[fol. c] Dec. 17. Filed judgment #48914 Albert Ralph Petti— Count Two. Three years at a place of confinement to be designated by the Attorney General of the United States and to stand committed until the fine is paid or he is otherwise discharged according to law.

And fined $2,500.

Released in custody of his attorney until 4 o'clock today —12/17/47.

Bail set at $5,000. pending appeal. Adair J. Manuf. Cas. Ins. Co.,

Dec. 17. Issued commitment in triplicate for Albert R. Petti.

Dec. 17. Filed notice of appeal by Albert R. Petti.

Dec. 17. Filed bond by Albert R. Petti 12/17/47 for $5,000. pending appeal (Manuf. Cas. Ins. Co.) Filed copy of order committing Thompson, Hope and Jones to Det. Hdqtrs. until after trial—Memo endorsed—"order satisfied".

Dec. 18. Filed transcript of record of proceedings dated 10/24/47—10/31/47.

Dec. 31. Filed transcript of record of proceedings dated 12/8, 12/9, 12/10, 12/11, 12/17 1947.

Jan. 21/48. Filed stipulation extending time of A. R. Petti to serve and file record on appeal to and including 3/1/48. So ordered. A. M. Bell, Clerk CCA.

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Feb. 16/48. Filed commitment and entered return deft. C. S. Rosenberg delivered to the N. J. Prison, Trenton, N. J., 12/18/47.

[fol. d] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ALBERT RALPH PETTI and CHARLES SOLOMON ROSENBERG.

INDICTMENT

The Grand Jury charges:

1. On or about the 28th day of October, 1945, at the Southern District of New York, Albert Ralph Petti and Charles Solomon Rosenberg, the defendants, unlawfully, wilfully and knowingly did transport and cause to be transported in interstate commerce, securities of the value of over $5,000. which had therefore been stolen, feloniously converted and taken feloniously by fraud and with intent to steal and purloin, knowing the said securities to have been so stolen, feloniously converted and taken, that is to say, at the time and place aforesaid, the defendants herein, unlawfully, wilfully and knowingly did transport and cause to be transported from the City of Newark, New Jersey to the City, State and Southern District of New York, certain securities of the value of over $5,000., to wit, 185 American Express Travellers' Cheques of the value of $5,400. and 128 Ameri-
[fol. e] can Express Money Orders of the value of $6,850., for a total value of $12,250., which said securities had theretofore been stolen, feloniously converted and taken by fraud and with intent to steal and purloin from the American Express Company, Atlantic City, N. J., (Title 18, United States Code, Section 415).

SECOND COUNT

The Grand Jury further charges:

1. That from on or about the first day of October, 1945, and continuously thereafter, up to and including the date of the filing of this indictment, at the Southern District of

New York, the above named defendants, and divers other persons to the Grand Jurors unknown, and Leo Thompson, James Albert Jones and Roosevelt Clinton Cash, named as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did conspire, combine, confederate and agree together and with each other to commit offenses against the United States, to wit, to violate United States Code, Title 18, Section 415, in the following manner: It was part of said conspiracy that the said defendants would transport and cause to be transported from the City of Newark, N. J., to the City, State and Southern District of New York, certain securities of the value of over $5,000., more fully described in count one of this indictment, which said securities had [fol. f] theretofore been stolen, feloniously converted and taken feloniously by fraud and with intent to steal and purloin from the American Express Company, Atlantic City, N. J., the said defendants herein, then and there well knowing said securities to have been so stolen, feloniously converted and taken.

OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York, the defendant Albert Ralph Petti registered at the Taft Hotel, New York, N. Y., on or about October 12, 1945, under the name of Albert Trinnell.

2. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about October 23, 1945, the defendant Albert Ralph Petti, made a telephone call from the Hotel Taft, New York, N. Y.

3. In further pursuance of said conspiracy and to effect the objects thereof, at the District of New Jersey, on or about October 27, 1945, Roosevelt Clinton Cash, one of the co-conspirators not named as a defendant herein, had a conversation with the defendant Charles Solomon Rosenberg.

4. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about October 28, 1945, the defendant Albert Ralph Petti made a telephone call from the Hotel Taft, New York, [fol. g] N. Y. (Section 418 (a), Title 18, United States Code).

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[fol. 1] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C. 126-317

UNITED STATES OF AMERICA

vs.

ALBERT RALPH PETTI

Before: Hon J. Leroy Adair, D. J., and a Jury.

New York, December 8, 1947; 2:00 o'clock p. m.

APPEARANCES:

John F. X. McGohey, Esq., United States Attorney, for the Government; by Martin Klein, Esq., Assistant United States Attorney.
Louis Halle, Esq., Attorney for Defendant.

(A jury of twelve was duly impaneled, examined and sworn; one alternate juror was duly examined and sworn.)

[fols. 2-3] CALVIN SMITH HEWITT, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination:

By Mr. Klein:

Q. Mr. Hewitt, what is your occupation?
A. Cashier of Railway Express Agency.
Q. In what particular office?
A. In the Atlantic City office.
Q. And where were you employed on October 25, 1945?
A. By the Railway Express Agency in Atlantic City.
[fols. 4-10] Q. Did you have the combination for the safe?
A. Yes, sir.
Q. Was that one of your duties in connection with that position?
A. That is right.

Q. And did anyone else open the safe after you closed it?

A. No, sir.

Q. What next did you learn in connection with the safe?

A. Not until the next day when I was to report for work.

Q. And what happened the next day? That would be the morning of October 26th?

A. That is right, yes, sir.

Q. What happened the next day?

A. I came to work and there wasn't any safe at all, it had been removed.

• • • • • • •

[fol. 11] Direct examination resumed:

By Mr. Klein:

Mr. Klein: Will you please mark these exhibits separately.

(Government's Exhibit 2 (21 pieces) marked for identification; Government's Exhibit 3 (3 pieces) marked for identification.)

Q. Mr. Hewitt, I show you Government's Exhibit 2 for identification and Exhibit 3 for identification. Do you recognize those exhibits?

A. Yes, I do.

[fols. 12-13] Q. Now using Exhibit 1 in evidence, can you tell us whether or not Exhibits 2 and 3 for identification were in the safe on the evening of October 25, 1945?

A. Yes, I can.

Q. Will you tell us, please after examination?

A. Well, these checks have serial numbers on which I know correspond with what we have here. That is proof that they were in the safe.

Q. And how about the money orders, Mr. Hewitt?

A. And the money orders also have serial numbers which correspond to what we had in the safe.

Mr. Klein: Government respectfully offers Exhibits 2 and 3 for identification into evidence at this time.

• • • • • • •

[fol. 14] Mr. Klein: Those are the very money orders and travelers' checks which were transported in interstate commerce.

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The Court: These here?
Mr. Klein: Yes, Judge.
The Court: Not made out at all?
Mr. Klein: That is right, Judge.
The Court: Just blanks?
[fol. 15] Mr. Klein: That is right, Judge.
The Court: For a particular amount?
Mr. Klein: That is right, Judge.
The Court: Objection is overruled, and the motion is overruled.
Mr. Halle: Your Honor will want to hear me on that question of value?
The Court: No, I don't think so at this time.

Direct examination resumed:

By Mr. Klein:

Mr. Klein: Will you mark the exhibits in evidence.

(Government's Exhibits 2 and 3 for identification received in evidence.)

• • • • • • •

[fols. 16-17] Mr. Klein: I think Mr. Halle may take my word that the total amount of these travelers' checks comes to $5400.
The Court: Well, is that what your exhibit shows?
Mr. Klein: Yes, Judge.
Mr. Halle: I don't think so, your Honor. My contention is that these papers have no value at all.
The Court: I understand your contention. Go right ahead.

[fol. 18] Eleanor Strom, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination:

By Mr. Klein:

Q. Where do you reside, Mrs. Strom?
A. 133 Mt. Pleasant Avenue, Newark.
Q. Newark, New Jersey?
A. That is right.

Q. And are you also known under the name of Eleanor Robinson?

A. Yes, sir.

Q. Is that your maiden name?

A. Yes, sir.

Q. Did you plead guilty in this court, Mrs. Strom, to the charge of perjury on October 17, 1947?

A. Yes.

Q. And have you been sentenced in connection with that charge of perjury?

A. No.

Q. Have any promises or representations been made by me to you in connection with the evidence which you are about to give?

A. No.

Q. Have you ever been convicted of any other crime?

A. I was with a family argument a good many years ago. There wasn't anything. I only had to pay the cost of court, which was $10.

Q. Anything else at all?

A. No.

Q. I direct your attention, Mrs. Strom, to the latter part of October 1945. Where did you reside then?

A. 133 Mt. Pleasant Avenue, Newark.

[fol. 19] Q. Is that the same building?

A. Yes.

Q. And what type of building is that, Mrs. Strom?

A. It is a 2½ story. It is a one-family with an attic.

Q. And do you know one Charles Solomon Rosenberg?

A. Yes.

Q. And do you know where he resided in the latter part of 1935?

A. Yes; 133 Mt. Pleasant Avenue, Newark.

Q. The very same building?

A. Same building.

Q. Did you have a telephone at 133 Mt. Pleasant Avenue?

A. No.

Q. Was there any phone nearby that was made available for your use?

A. We used to use the telephone next door.

Q. Do you remember the address of the building where the phone was?

A. 129.

Q. And do you know the lady who owned that building?

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A. Not much.
Q. Was it—do you know her name?
A. Yes.
Q. What was her name?
A. Mrs. Marion.
Q. And was it a pay station or a private phone?
A. A pay station.
Q. And were you ever called to that phone to answer calls?
A. No.
Q. Were there any calls received for Charles Solomon Rosenberg?
A. No.
Q. Were you ever called to answer the phone for Charles [fol. 20] Solomon Rosenberg?
A. Not that I remember.
Q. Do you know whether Charles Solomon Rosenberg received any calls there—if you know——
A. He used to receive calls, yes.
Q. Now I direct your attention particularly to October 27, 1945, or thereabouts. Do you recall an occasion when you came over to New York, Mrs. Strom?
A. Yes.
Q. And where were you going?
A. To the Roxy movies.
Q. Where is the Roxy Theatre located?
A. In New York, I don't know.
Q. And was anyone with you?
A. Yes.
Q. Who was with you?
A. Charles was with me; Charles Rosenberg.
Q. Is Charles Rosenberg known as Charlie to friends and intimates?
A. I guess so.
Q. What do you call him?
A. Charlie.
Q. And on that occasion when you came over to New York did you and Charlie meet anyone?
A. Yes.
Q. Who did you meet?
A. We met a friend over there and I saw him talking to him.
Q. Who was the friend that Charlie met?
A. A fellow that he called Doc.

Q. Do you know Doc's whole name?
A. No, I never knew it.
[fol. 21] Q. Have you learned his real name since that occasion?
A. Yes, now.
Q. What is his name?
A. I think it is Petti.
Q. Do you see him in court here?
A. Yes.
Q. Will you point him out, please?
A. Right there (indicating).
Q. The gentleman seated right by——
A. Yes.

Mr. Klein: May the record indicate that the witness identified the defendant Albert Ralph Petti.

Q. Now, what happened on that occasion?
A. We went to the movies, and Charlie was talking, but I don't know what he was talking.
Q. Well, did Charlie and Petti talk before you went to the movies?
A. Yes.
Q. Where did this conversation take place?
A. Next door, next to the Roxy movies.
Q. Do you know what was next to the Roxy movies?
A. Yes, a hotel.
Q. Do you know the name of the hotel?
A. I think it is the Taft.
Q. And was the conversation on the street or in the lobby?
A. Outside.
Q. On the street?
A. Yes.
Q. Did you hear what was said at all?
A. No.
Q. How long did they talk together?
A. Two minutes.
[fol. 22] Q. And then where did you go?
A. To the movies.
Q. Now, what time did you finish with the movies?
A. We were home at 12 o'clock.
Q. 12 that night?
A. Yes.
Q. And did you see Petti again?

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A. Later that night somebody came and Charlie went out in the yard.

• • • • • • •

Q. Did you see who came to see Charlie that night? Did you admit anybody to the front door?

A. Yes, I opened the door.

Q. Well, who did you admit?

A. Doc.

Q. Was anybody with him?

A. No, I didn't see anybody.

Q. When you say "Doc," you mean the defendant Petti sitting here?

A. Yes.

Q. And what did he talk about after he came into your home?

A. Charlie went out in the yard.

Q. And did you hear anything that was said at all?

[fol. 23] A. No.

Q. Did you see anything pass?

A. No.

Q. How long did Doc stay there?

A. A few minutes.

Q. And what did he do next?

A. Went away?

Q. And what time was that, about, Mrs. Strom?

A. After we got home from the movies.

Q. What time did Petti arrive there and what time did he leave, approximately?

A. I guess about one o'clock in the morning.

Q. Did you see Petti after that?

A. I saw him on a Wednesday.

Q. On a Wednesday. You mean October 31, 1945?

Mr. Halle: One minute. I object to that.

Q. Well, can you tell us the date, Mrs. Strom?

A. It was on a Sunday and then a Wednesday.

Q. Can you tell us the date at all, Mrs. Strom, if you can?

A. I guess it was three days after, that is the 31st.

Q. Can you tell us what the day was, so far as month and day was concerned?

A. It was a Wednesday.

Q. Well, can you tell us what day of the month and what month it was?

A. No.

• • • • • • •

[fol. 24] Q. Did you talk to Charlie at all about what happened on Thursday?

A. It was Wednesday that Doc and Tony was to the house.

Q. I am trying to find out the date. What day and what month it was in, if you can help us. Did anything occur at or about that time which will help you determine the exact date?

A. Well, it was the same month that we went to the movies, the same month, on a Sunday.

Q. It was three days after you went to the movies, is that right?

A. Yes.

• • • • • • •

[fol. 25] Q. Well, do you know when Doc was arrested?

A. Yes.

Q. What day was Doc arrested?

A. The next day.

Q. What day was Doc arrested, do you know the month [fol. 26] and day?

A. The same week, that same week he was arrested, the same week after we went to the movies, the next following week on Thursday.

Q. And when was this Wednesday that you are talking about, the day before the arrest?

A. Yes.

• • • • • • •

Q. Did you talk to Petti on that Wednesday when he came there?

A. Yes.

Q. What did he say to you?

A. I just asked was he going to New York.

Q. And what did he say?

A. He said yes.

Q. And you mentioned another name, someone was with [fol. 27] him.

A. Yes.

Q. Who was that?

A. He was with a fellow named Tony.

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Q. And did you see Petti again after that?
A. No.
Q. Did you see the other fellow again after that?
A. Yes.
Q. When did you see the other fellow?
A. Next day.
Q. That is Thursday?
A. Yes.

• • • • • • •

ROOSEVELT CASH, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

• • • • • • •

Q. Now I direct your attention to the evening of October 25 and the early morning of October 26 of 1945. Do you recollect that occasion?
A. Yes, sir.
[fol. 28] Q. What did you do that night?
A. Well, that was the night the American Express office was broken into.
Q. I can't hear you; speak a little louder.
A. I say that was the night that the American Express office was broken into in Atlantic City, New Jersey.

Mr. Halle: If the Court please, I take it that this man's testimony is going to be taken subject to connection with this offense.
The Court: I presume so.
Mr. Halle: I don't know at this time whether it is going to be material or not.
The Court: I presume it is.

Q. Who burglarized the American Express Company that evening?
A. Two of the friends I have downstairs which are with me.
Q. What are their names?
A. Leon Tompkins and James Jones.
Q. Now, what did the three of you do that evening? Just tell us what occurred.
A. Well, those two fellows broke into the place and then

they came to get me, and when I got there the safe was out on the sidewalk and I helped them move it out to the dumps and we broke into the safe, and there was no cash in there to speak of, only $15 in cash, about $18,000 in railroad checks. Well, they didn't know what to do with the checks, and I didn't think the time myself, so I just [fol. 29] picked them up and carried them home, and then I thought about I had a friend in Newark, maybe he would get rid of them for me.

Q. What is the name of the friend in Newark?

A. Rosenberg.

Q. Is that Charlie Rosenberg?

A. Yes, sir.

Mr. Klein: (Addressing deputy marshal) Mr. Gibson, can we have Mr. Rosenberg for identification.

Q. And did you call Charlie Rosenberg?

A. I called him first and asked him if he could get rid of them for me. He said yes. So I took the train the next day——

Mr. Halle: I object to any conversation he had with Rosenberg.

The Court: Objection overruled.

A. (Continuing) So I took the train and went up to Newark, up to his house, and went up to his bedroom. His wife let me in.

Q. When did you do that, on what day?

A. The same night, the same night I called him up, and next morning I went up to Newark.

Q. That would be the 27th of October?

A. I can't remember dates, sir.

Q. Well, you say that the burglary took place in the early morning hours of the 26th?

A. Well, that would be, and I phoned him the same morn- [fol. 30] ing at his office, and the next day I am pretty sure I went to his house.

Q. And that would be the 27th?

A. Yes, sir.

Q. Will you take a look at this man here, would you look at that man?

A. Yes, sir.

Q. Do you recognize him?

A. Yes, sir.

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Q. Who is that?
A. That is Charlie Rosenberg.

Mr. Klein: May the record indicate that the defendant Charlie Rosenberg was identified by the witness Cash.

Q. Now, you said you came on to Newark from Atlantic City?
A. Yes, sir, on the train.
Q. And did you bring with you these checks?
A. Yes, sir.
Q. What did you carry them in?
A. I think in a paper bag; I am not sure.
Q. Well, I show you this bag; do you think you recognize it or was it something other than that?
A. I could not swear that was the bag.
Q. Tell us what you did when you got to Newark.
A. I took a taxicab and went to Mr. Rosenberg's house. He was upstairs asleep. So his wife told me to go upstairs, and I went upstairs and spoke to him, and he said he could get rid of them for me, but I would have to wait for a week or so. So I asked him did he have any money on him, and [fol. 31] he said he had a few dollars, I think he said he had about $100 or $50, something like that. Anyway I got half of what he had, I think it was either thirty or forty dollars, I am not sure.
Q. And you left the money orders and travelers' checks with him?
A. Yes, I left everything with him.
Q. And how long did you stay at Rosenberg's house?
A. I did not stay there long, because there is only two trains to Atlantic City, only two other trains, and I think I had gotten there just in time enough if I did not stay too long to catch the next train back, and I don't know if that was afternoon, I am not sure whether it was afternoon or morning that I got there, but I know I wasn't there long because I had to catch the next train back.
Q. And then did you go back to Atlantic City?
A. I did two or three days afterwards.

* * * * * * *

Q. Did you come back to Newark?
A. A couple of days I came back to Newark.
Q. Did you talk to Charlie Rosenberg again?

[fols. 32-35] A. Yes. He told me that——

Q. Tell us what Charlie said to you and what you said to him, please.

Mr. Halle: I object, if the Court please.

The Court: Objection overruled.

A. He said—I am going to try to tell you as close as I can what was said, you can't take it word for word, because it has been quite a long while.

Q. No; substaptially.

A. Well, the gist of the whole thing was that somebody got caught with them over in New York, and he saw that I did not believe that, so he showed me a clipping.

Q. Showed you a newspaper clipping?

A. Yes, sir.

Q. Did you recognize the name in the clipping?

A. Well now, I don't think I did.

Q. Well, did he tell you who?

A. I think he said—I can't say for sure he told me who.

Q. And did you get any more money from him?

A. No, sir.

• • • • • • •

[fol. 36] Charles Solomon Rosenberg, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

• • • • • • •

[fol. 37] Q. Are you the same Charles Solomon Rosenberg who was indicted in indictment C 126-317, together with Albert Ralph Petti, for transporting and causing to be transported and conspiracy to transport and cause to be transported securities over a value of over $5,000 in inter-
[fol. 38] state commerce?

A. Yes, sir.

• • • • • • •

[fol. 39] Q. Do you know someone named Albert Ralph Petti?

A. Yes, sir.

Q. I can't hear you.

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A. Yes, sir.
Q. And do you know what his nickname is or was?
A. Doc.
Q. Do you see Albert Ralph Petti in court?
A. Yes, sir.
Q. Will you point him out, sir.
A. (Indicating).
Q. The gentleman seated here at counsel table?
[fol. 40] A. Yes, sir.

Mr. Klein: May the record indicate that the defendant Albert Ralph Petti was identified by the witness Rosenberg.

Q. I direct your attention to the latter part of October, 1945. At that time, Mr. Rosenberg, how long did you know Petti, approximately, sir?
A. A couple of months.

Mr. Halle: It is impossible for me to hear.

Q. A couple of months?
A. A couple of months.

The Court: Speak a little louder, Mr. Rosenberg.

Q. And do you remember an occasion on or about the 27th of October, 1945, when someone named Cash visited you?
A. Yes, sir.
Q. Yesterday afternoon you were called into this courtroom and you stood in that corner over there, do you recollect that, Mr. Rosenberg?
A. Yes, sir.
Q. Did you see who was on the witness stand at that time?
A. Cash.
Q. And is that the man who came to see you on or about October 27, 1945?
A. Yes, sir.
Q. Where did Cash see you?
A. At the house.
Q. And what was the address of the house, Mr. Rosenberg?
A. 133 Mt. Pleasant Avenue, Newark.
Q. Did you have a conversation with Cash?

A. Yes.

[fol. 41] Q. What did you say and what did he say?

Mr. Halle: I object to that, if the Court please.

The Court: Do you intend to connect this with the second count?

Mr. Klein: Yes, Judge. The witness is a co-defendant and a co-conspirator. Cash is named——

The Court: Well, you must first prove a conspiracy before this testimony will be satisfactory. If you say to me that you expect to prove it——

Mr. Klein: I do, Judge.

The Court: Otherwise I would strike it.

Mr. Klein: I will do that. Cash has been named in the indictment as a co-conspirator.

The Court: Certainly, I understand that.

Mr. Halle: With that reservation, your Honor admits it?

The Court: With that reservation.

Q. Now will you tell us what you said to Cash and what he said to you.

A. He came up with some money orders and asked me if I wanted to buy them and sell them.

Mr. Halle: I couldn't hear it.

The Witness: He came up with some money orders and asked if I wanted to buy them. I told him I could not use them. "Well," he said, "I will leave them here, because [fol. 42] I don't want to take them back with me," and he asked me if I would loan him $30 for his rent. I loaned him the $30 and he went away.

. . . . . .

Q. Well, did he leave some books with you?

A. Yes, sir.

. . . . . .

[fol. 43] Q. Mr. Rosenberg, you kept the books that Cash left?

A. Yes, sir.

Q. And did Cash tell you where he got the books?

A. No, sir.

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Q. Didn't Cash tell you how he came to be getting the books?

Mr. Halle: I object. The witness has already answered.

The Court: He has answered.

Q. Mr. Rosenberg, did you hear the question?
A. Yes, sir.
Q. What did you do with those books once you got them from Cash? Where did you keep them?
A. I put them in the house.
Q. Did you put them in any bag or valise or anything?
A. They were in a bag or a paper of some kind.
Q. Did you have occasion to look at the books?
A. Yes, sir.
Q. I show you Government's Exhibits 1 and 2 in evidence. Do these look like the books?

Mr. Halle: I object to that.
[fol. 44] The Court: He may answer. Objection overruled. Did they look like that?
The Witness: They looked like these.

Q. Looked like these, indicating Government's Exhibit 2?
A. Yes, sir.
Q. I show you this bag, not marked yet; do you recognize that at all?
A. No, sir.
Q. Now, either that day or the next day did you come on to New York?
A. Yes, sir.
Q. Who came with you?
A. Eleanor.
Q. Is Eleanor the person known as Eleanor Robinson, Eleanor Strom, her married name?
A. Yes, sir.
Q. And did she reside at that same address?
A. Yes, sir.
Q. And where were you going, Mr. Rosenberg?
A. To the Roxy Theatre.
Q. Did you meet anyone at or near the Roxy Theatre?
A. I met Doc there at 50th and Broadway, by accident.
Q. You met Doc?
A. Yes.

Q. You mean Petti?
A. Yes, sir.
Q. Did you have a conversation with him?

Mr. Halle: May I get the former answer?

(Questions and answers read by the reporter.)

The Court: Speak up so everybody can hear you.

Q. Was that near the theatre where you met him?
[fol. 45] A. Yes, sir.
Q. Did you talk with him?
A. Yes, sir.
Q. Did Eleanor take part in the conversation?
A. No, sir.
Q. Who was present besides you and Doc, anyone else?
A. No, sir.
Q. All right. Now, what did you say?
A. I told him about the things I had.
Q. When you say "things", what do you mean, Mr. Rosenberg?
A. About the money orders I had; and I asked him if he could do anything with them, and he said, "Well, I will try to see what I can do with them, I don't know whether I can handle them or not." So I said, "Well, come over to Newark and I will give them to you."

Mr. Halle: What is that again?
Mr. Klein: "Come over to Newark and I will give them to you."
The Witness: And he came over.

Q. Wait. Anything else said at that time?
A. No, sir.
Q. And did you leave Doc at that point?
A. Yes, sir.
Q. Where did you go?
A. To the movies.
Q. Do you remember what movies that was?
A. No, sir.
Q. Was it far from where the conversation took place?
[fol. 46] A. No; next block.
Q. Do you remember whether you were in front of any hotel at the time where the conversation took place?

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A. Yes, sir.

Q. What hotel?

A. The Taft Hotel.

Q. Did you receive any phone calls from Petti?

A. Yes, sir.

Q. Did you receive any at or about that time, between the latter part—in the latter part of October, 1945?

A. Yes, sir.

Q. And where did you receive these calls?

A. Miss Marion's house.

Q. Is that the next door neighbor of yours?

A. Yes, sir.

Q. Now, you say you went to the movie. What did you do after the movie?

A. Went home.

Q. Who went home with you?

A. Eleanor.

Q. Anyone else?

A. No, sir.

Q. And what happened later that evening?

A. Later that evening Doc came over.

Q. So that the record is clear, when you are speaking of Doc, you mean Albert Ralph Petti, the defendant in this case?

A. Yes, sir.

Q. What happened when he came over to Newark?

A. I handed them to him, and he said, "I will see if [fol. 47] I can do anything with them."

Q. What part of your home did you talk to him—in what part of your home did you talk to him?

A. Out in the yard.

Q. Did Eleanor see Petti when he arrived that evening?

A. No sir—she seen him when he arrived, yes, sir.

Q. Did she take part in the conversation?

A. No, sir.

Q. Can you tell us what was said, the substance, at least, if you don't remember the exact language, as to what you said to Petti and what Petti said to you?

A. I just asked him if he can use these, and he said, "I will see what I can do with them," and he took them with him. That is the last I seen of him.

Q. And did you give these books to Petti in that paper bag?

A. Yes, sir.

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[fol. 48] Q. How long did Petti stay with you at your place in Newark that evening?

A. Just a few minutes.

Q. Was anybody else with him?

A. No, sir, I didn't see anybody else with him.

Q. Did you see Petti after that?

A. No, sir.

Q. Did you receive any telephone calls from him after that?

A. On the 28th I think he called up and said he would be over.

Q. Did you call him at the Taft?

A. That same day, only in the early part of the day.

Q. Did you call him at the Taft at all?

A. No, sir.

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[fol. 49] Q. Did you see Petti at any time after the night when you gave him these papers?

Mr. Halle: I object further on the ground the witness has already stated he never saw him after that time.

The Court: Objection overruled.

What was your answer?

The Witness: Yes, sir.

The Court: Yes, sir.

Q. Where and when did you see him after that occasion?

A. I seen him at the house a couple of times.

Q. Did you talk to him then?

A. Yes, sir.

Q. What was said, substantially?

A. I told him if he did not get rid of them to bring them back to me and he said he would, he said he could not get rid of them and he would bring them back.

[fols. 50-72] Q. Did you see Cash again?

A. Yes, sir.

Q. When did you see Cash?

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A. About a week later, I guess.
Q. And did you talk to Cash?
A. Yes, sir.
Q. Tell is what did you say to Cash and what did he say to you. By the way, where was that conversation?
A. In the house.
Q. In Newark, New Jersey?
A. Yes, sir.
Q. 133 Mt. Pleasant Avenue?
A. Yes, sir.
Q. All right. Now, what was said?
A. He came up for the books or the money. I told him the fellow in New York was arrested with them and I could not pay him. I showed him the clippings—the clipping of Doc being arrested over in New York. Doc—I mean Cash, went home.

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[fols. 73-77] MAURICE A. NEWFIELD, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

Q. What is your occupation?
A. Chief Special Agent for Railway Express Agency and agencies of American Express Company.

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[fol. 78] Q. Now, these papers, Exhibits 2 and 3, they are made or issued by whom?
A. American Express Company.
Q. And they, the American Express Company, then distributes these papers, Exhibits 2 and 3 or similar ones, to their different agencies, right?
A. Yes, sir.
Q. And they are bought by customers?
A. Yes, sir.
Q. At the time of purchase a customer puts his name down, right?
A. On a portion of the financial paper.

Q. In other words, he signs his name or he usually signs his name on the top line?

A. In the upper lefthand corner.

Mr. Klein: Of what document, Mr. Newfield?

The Witness: The travelers' checks.

Mr. Halle: The travelers' checks.

Mr. Klein: Thank you.

[fol. 79] Q. And it is then that, when it is paid for by the customer, the instrument is delivered to the customer?

A. After the customer has signed each one in the presence of the issuing employee.

Q. And with reference to the paper that you call a money order, does the customer have to sign anything?

A. The customer has to sign an endorsement at the time of encashment.

Q. But when the customer gets the paper does anybody from the American Express Agency have to sign this?

A. An employee of the American Express Company or the Railway Express Company or any bank or office, drug-store or whatnot, that is authorized to issue these as agent of American Express Company, places a rubber stamp showing the name of that office, a symbol of their settling number and a rubber date or stamp showing the point of issuance and the date of issuance.

Q. In other words, to validate the exhibit you have in your hand as—that is Exhibit 3, is it, sir?

A. Yes, sir, it is.

Mr. Klein: Money orders are three. On the back it says.

Mr. Halle: Oh, yes.

Q. In order to validate any of the sheets of paper in Exhibit 3 into a money order, an officer of your company or [fol. 80] the bank to whom you may issue it, must first sign it?

A. Not an officer, sir; an employee.

Q. I mean an employee.

A. An employee.

Q. And that is before it becomes issuable, is that right?

A. That is legitimately issuable.

Q. Yes; and with reference to the travelers' checks, the customer has to sign in the presence of the employee of your company before it is issued?

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A. Yes, sir, because the document itself bears a facsimile signature of an officer authorized to issue them.

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[fol. 81] Redirect examination.

By Mr. Klein:

Q. What do you mean, Mr. Newfield, when you said before "legitimately issuable" in answer to Mr. Halle's question?

A. In my investigations at times I have found that travelers' checks——

Mr. Halle: I object to what he has found.

The Court: Yes, objection sustained.

The Witness: I meant that the forgery of signatures and of the purchaser——

Mr. Halle: Your Honor made a ruling on my objection.

The Court: Yes, I sustain it.

Mr. Halle: Then I ask that that answer be stricken.

The Court: He is answering differently now, I understand, than he was answering before.

Q. Have you completed your answer?

A. Forgeries of signatures on the travelers' checks of the purchaser.

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[fol. 82] Q. Will you tell us, Mr. Newfield, whether the American Express Company honors all money orders that are cashed?

A. Yes, sir.

Q. And travelers' checks?

A. Yes, sir.

Q. Where are places that travelers' checks can be cashed?

A. Any place in the world.

Q. How about money orders?

A. Any place in the world, upon certain identification.

Q. Is identification necessary when cashing a travelers' check?

A. No, sir.

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[fol. 83] EARL E. RILEY, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

Q. Mr. Riley, your occupation, sir.
A. Special agent, Federal Bureau of Investigation.
Q. How long are you so employed?
A. For about six years.
Q. And what office are you presently assigned to?
A. I am assigned to Washington, D. C.
Q. And where were you assigned in October or November 1945?
A. In Newark, New Jersey.
Q. I direct your attention particularly, Mr. Riley, to the 31st of October 1945. Do you remember that day, sir?
A. Yes, sir, I do.
Q. Did you receive an assignment on that day?
A. Yes, sir, I did.
Q. Concerning who?
A. Albert Ralph Petti.
Q. And did you go anywhere?
A. Yes, sir, I did.
Q. Did anyone accompany you?
A. Yes, sir.
Q. Do you recall who it was that accompanied you?
A. Special Agents Richard A. Harrison and Moritz Gallon of the Newark office.
Q. Where did you go?
A. To New York City.
Q. And did you meet any other agent?
A. Yes, sir, in New York City we met Special Agent [fol. 84] Charles B. Peck.
Q. That makes four of you altogether?
A. Yes, sir.
Q. Where did the four of you go?
A. We proceeded to the Taft Hotel in New York City.
Q. And can you tell us approximately what time the four of you arrived at the Hotel Taft on October 31, 1945?
A. About 7:30.
Q. P.M or A.M.?
A. P.M.

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Q. What did you do at the Hotel Taft?

A. Peck and myself went to Room 340, and Harrison and Gallon stayed in the lobby.

Q. And did you stay in Room 340 after that?

A. Yes, we did.

Q. And what occurred next?

A. Approximately about one o'clock, one a.m. in the morning of November 1st, Albert Ralph Petti and an individual who identified himself as Anthony Lomano came into the room.

Q. And do you mean that you and Peck stayed continuously in that room from 7:30 p.m. until about 1:00 a.m.?

A. Yes, sir.

Q. Now, do you recognize one of the persons who appeared at that time in the room?

A. Yes, sir, I do.

Q. Do you see him in court?

A. Yes, sir, I do.

Q. Will you point him out?

A. Yes, sir, that is he over there (indicating).

[fol. 85] Mr. Klein: May the record indicate that the defendant Albert Ralph Petti was identified by the witness.

Q. Now, what happened, sir?

A. Well, about 1:00 a.m. when they came into the room I placed Albert Ralph Petti under arrest.

Q. Did you identify yourself?

A. Yes, sir, I identified myself as a special agent with the FBI, and also Agent Peck. Placed him under arrest, and during the search we discovered several papers and cards and keys and other odds and ends in the room. I immediately, on his entering the room and immediately after the search of his person, I called the lobby and had Special Agents Harrison and Gallon come up to the room. When they came up to the room we continued our search of the room, and during the search Agents Peck and Harrison went into the closet, the clothes closet, and there picked up a suitcase. It was—they picked up the suitcase and shook it around, and they asked Mr. Petti what was in the suitcase. Offhand he just made the remark that if he would have known this was going to happen he would have gotten rid of that. We asked him if he had a key. At first he denied that, but we found a key that fit the suitcase among

his personal possessions, and Agent Peck or Harrison [fol. 86] opened the suitcase and extracted a paper bag from the suitcase.

Mr. Klein: Will you please mark this for identification.

(Government's Exhibit 4 marked for identification.)

Q. I show you Government's Exhibit 4 for identification, and ask you whether or not you recognize it?

Mr. Halle: Before the witness answers this question, I would like to ask your Honor's permission if I may examine this witness as to how he got into the room.

The Court: Until your cross-examination comes. I will permit that before the admission.

Mr. Halle: All right.

The Court: Read the question.

Q. (Read.)

A. This appears to be the bag that the checks were in that we found checks in the bag, checks and money orders of American Express Company.

Q. Are there any initials on the paper?

A. Yes, sir, the initials are "CBP", and the date 11/1/45.

Q. Do those initials appear on the bag?

A. Yes, sir, they do.

Q. Was that done in your presence?

A. Yes, sir, it was.

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[fol. 87] Q. What was in the bag?

A. American Express Company money orders and travelers' checks.

Mr. Halle: I object, if the Court please.

The Court: Objection overruled.

Q. Tell us what happened next.

A. At just about that time or during the search, while we were in the room and in Mr. Petti's presence, a telephone call was received at the room.

Mr. Klein: At this point may I offer in evidence Government's Exhibit 4 for identification.

The Court: It may be so offered.

Mr. Klein: Received as Government's Exhibit 4.

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The Court: No, not received, offered. Offered in evidence. Is there any objection?

Mr. Halle: I object to it.

The Court: I will hear you on your cross-examination before I pass on it. It may be considered as offered.

Mr. Klein: It is not being received at this time, if your [fol. 88] Honor please?

The Court: No. The gentleman has asked for an opportunity to cross-examine the witness before it is admitted.

Q. Tell us what happened next.

A. This telephone call was received and Mr. Petti answered the phone and invited the caller to come up to the room. A short period of time, I think it was just a few minutes later, Vincent d'Angelico, or a person who identified himself as that, came into the room. He, among other things, at that time told us that he lived in the hotel, in the Taft Hotel there, and his room was 1556. We proceeded from Room 340——

Q. Well now, before you left the room did d'Angelico leave before?

A. Yes, sir, he did.

Q. And you agents left?

A. Yes, sir, we did.

Mr. Klein: Please mark this for identification.

(Government's Exhibit 5 marked for identification.)

Q. I show you Government's Exhibit 5 for identification, and ask you if you recognize that document, that book?

A. Yes, sir, I do.

Q. Where was it first seen by — ?

A. This was taken from Mr. Petti's person at the time we had the personal search of him, among other papers.

Mr. Klein: I offer the same at this time.

Mr. Halle: I object to it.

[fol. 89] The Court: It may be considered as offered and presented to counsel.

Q. Did you ask Petti any questions about the book, or did one of the other agents?

Mr. Halle: I object to any questions at this time that may have been asked of Petti.

The Court: What is the objection?

Mr. Halle: That I would like to ascertain from the witness first what brought them there and how they got in, and if it may appear that they had no right to go in, then whatever they discovered would not be competent.

The Court: All right, I will let you.

Mr. Klein: May we approach the bench, if your Honor please?

The Court: Yes.

(Conference at the bench between Court and counsel, not in the hearing of the jury, as follows:)

Mr. Klein: If there is going to be any problem about search and seizure, then I would like the jury to be excused, since some of the evidence that may be adduced at that time may be prejudicial.

The Court: You would like what?

The *Court:* The jury to be excused if your Honor is going to hear argument about search and seizure since, as I say, some of the evidence may be prejudicial to the defendant [fol. 90] or might constitute reversible error if there is a conviction.

The Court: That is not what he is asking for. He is asking to cross-examine the witness.

Mr. Klein: Oh no, he said also "And by what right they got into the room and what they found in the room may have been improperly received." I take it that means search and seizure.

Mr. Halle: Yes.

The Court: Is your objection to the fact that it was illegally obtained?

Mr. Halle: That would be my objection if it should develop that it was an illegal seizure.

The Court: All right. The jury may retire.

(The jury left the courtroom and the following took place in their absence:)

The Court: On that objection, you may cross-examine.

Mr. Klein: May I make a statement for the record, if your Honor please?

The Court: You may.

Mr. Klein: May I point out to your Honor that up to this moment no motions have been made with respect to suppression of evidence, and I would like to call your

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Honor's attention to the fact that what Mr. Halle is at-
[fol. 91] tempting to do now is moving to suppress certain evidence that was obtained at a time when someone was arrested.

The Court: That may develop if that is his motion. Well, it is not a motion, it is an objection to the introduction and being received now, isn't that right?

Mr. Klein: That is right. That is my position, your Honor.

Mr. Halle: I just want to make this observation. I take the rule to be that if we know of, had reason to believe to make a motion of this kind prior to trial, we could make it prior to trial, but when it develops on the trial, we have the privilege of raising it then.

Preliminary cross-examination.

By Mr. Halle:

Q. Now, Mr. Witness, you say you went into the Taft Hotel on October 31?

A. Yes, sir, that is correct.

Q. What time of the day?

A. About 7.30.

Q. In the morning?

A. P. M., at night.

Q. And did you go—you went up to a room there, you say?

A. Yes, sir, that is correct.

Q. And what was the number of the room?

A. Room 340.

Q. And was the room locked?

A. I believe it was, yes, sir.

Q. And did you first go to the room and try it?

A. No, sir.

[fol. 92] Q. Or what did you do first when you went to the Taft Hotel?

A. Any arrangements for entering the room were not made by myself. However, I was along at the time the entrance was made into the room.

Q. You went to the Taft Hotel, and who did you first meet there?

A. Well, I was just—the only person outside of the agents who accompanied me was an assistant manager of the hotel.

Q. And who went to the assistant manager to announce your arrival?

A. I believe that was Agent Peck.

Q. Yes. And the assistant manager, did he have a key to the room?

A. Yes, sir.

Q. And he unlocked the door, right?

A. Yes, sir.

Q. The door was locked, right?

A. Yes, sir.

Q. And did any one of you, you or your fellow agents, knock on the door first?

A. No, sir, I don't believe I did. It may have been one of the other agents. I don't recall that.

Q. Well, you knew before you got to the door that Petti was not in there at the time?

A. I presumed such, yes, sir.

Q. You say somebody made arrangements with the hotel to get into the room?

A. I presume I did, because——

Q. That was one of your agents, fellow agent?

A. Yes, sir.

[fol. 93] Q. And were those arrangements made to get into Petti's room in his absence?

A. In Mr. Petti's absence?

Q. Yes.

A. Yes, sir, I presume they were; I was not present at the making of the arrangements.

Q. And so when you got into the room it was closed, you closed the door behind you?

A. Yes, sir.

Q. And remained there until 1.30 in the morning?

A. Yes, sir.

Q. Did you look about the room during all those hours?

A. Just for his presence to make certain he was not there.

Q. And you knew that that was Petti's room?

A. We were not certain until his arrival that actually——

Q. Well, you know it was registered in his name?

A. In whose name?

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Q. In Petti's name.

A. No, sir, it was not registered in his name.

Q. Well, how did you know it was his room?

A. We had received information that an individual who in all probability was Mr. Petti was in that room.

Q. In other words, you had received information that Petti was the man who was registered for that room, regardless of the name it was registered in?

A. Yes, sir.

Q. And it was your intent to arrest Petti in the room?

A. Yes, sir; or wherever we might find him.

Q. And it was your intent to get into that room without [fol. 94] Petti's knowledge, and get there in his absence?

A. No, sir, not necessarily. If he were in the room we would have still requested entrance to it.

Q. Do you mean of the management?

A. Or of Mr. Petti if he were in the room.

Q. Yes; but you brought the assistant manager up with you to have him unlock the door before you even found out whether Petti was in there or not?

A. Well, as I say, the arrangements for getting into the room were made in my absence. True the assistant manager accompanied us to the room. However, it may have been determined in my absence that Mr. Petti was not in the room.

Q. Who made the arrangements?

A. Mr. Peck made arrangements to get in.

Q. He was one of you four gentlemen?

A. Yes, sir.

Q. And you found out after you were in that room with your—who was the agent who went up with you, Mr. Peck?

Q. And the other two agents remained downstairs?

A. Yes, sir.

Q. And it didn't take you long to find out, after getting into the room, that Petti was not there?

A. That is true, yes, sir.

Q. And you arranged with the manager of the hotel to stay in that room until Petti would come?

[fol. 95] A. Correct, yes, sir.

Mr. Halle: That is all.

Direct examination resumed.

By Mr. Klein:

Q. Why were you looking for Mr. Petti?

Mr. Halle: I object unless it should appear that the witness had an order of arrest or had a—I will withdraw that—had a warrant for Petti's arrest or a search warrant to go into his room. I will withdraw the first remark, simply confining myself to a search warrant to go into the room where Petti was registered.

The Court: Why did he look for him, what cause, this case or something of that sort?

Mr. Klein: Yes.

The Court: In the absence of the jury he may answer. Looking for him on this case, is that what you mean?

The Witness: No, sir.

The Court: Something else?

The Witness: Yes, sir.

The Court: Did you have a warrant for him?

The Witness: Shall I give you the charge, your Honor?

The Court: I don't care about that. Some other charge than this, though?

The Witness: Yes, sir.

[fol. 96] The Court: And did you have a warrant for him on that charge?

The Witness: Well, it——

Mr. Klein: Well, would you say you needed a warrant on that?

The Witness: No, sir, I did not.

The Court: It is for the Court to decide that. I want to know whether he did have a warrant.

The Witness: No, sir, I did not have a warrant.

The Court: None of you had a warrant?

The Witness: No, sir.

The Court: Now you may proceed.

Mr. Klein: In view of the fact it is without the presence of the jury, that is the reason I suggested this type of questioning without the presence of the jury, will you tell us what charge?

The Court: What is the difference? It wasn't this one, was it?

Mr. Klein: No, it was not, sir.

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The Court: Well then, that is all I care for. They wanted to arrest him on some other charge?

Mr. Klein: That is right, sir.

The Court: And he came in.

By Mr. Klein:

Q. As a matter of fact, was there more than one charge [fols. 97-98] outstanding against Mr. Petti at that time?

A. Yes, sir, I understand there was.

The Court: Well now, what is your motion?

Mr. Halle: My motion is to strike out the evidence which thus far has been received by the Court, to wit, Exhibits 2 and 3, and all reference to those two exhibits, upon the ground that it appears at this time that the agents went into the room occupied by Petti in his absence without a warrant.

The Court: Well, there isn't any controversy between you gentlemen on the facts, is there?

Mr. Halle: No.

The Court: You gentlemen agree that those are the facts as explained by this witness. All right. I will hear you here at two o'clock, and I would like to have you furnish some authority for your contention.

* * * * * * *

[fol. 99] AFTERNOON SESSION

Mr. Klein: May I at this time, if your Honor please, recall Agent Riley to the stand in order to secure more pertinent information in connection with the search and seizure?

The Court: What do you want? I thought we had settled that this morning. What do you want?

Mr. Klein: I want to show to your Honor that, first, that Agent Riley had knowledge that the defendant Petti was a deserter from the United States Army; secondly, that a warrant had been issued for Petti's arrest in the District of New Jersey long before the actual arrest took place, as the subject of a bail jumping, in that the defendant did not appear in connection with the second crime where bail——

The Court: Is that in the jurisdiction of the FBI?

Mr. Klein: Yes, it is, your Honor.

The Court: You may call him, go ahead, if that is what you want to show, and do it as quickly as possible.

Mr. Halle: That is rather strange, your Honor, in view of the fact that the witness has said he did not have a search warrant.

Mr. Klein: It is true the witness said he did not have a search warrant, and I also said——

[fol. 100] The Court: If there is any contention about it, his contention now is that he had a warrant, so that——

Mr. Klein: Not that he had a warrant on his person, I think he answered that negatively to Mr. Halle's question.

The Court: Well, let's get it straight now.

Mr. Halle: All right.

Earl E. Riley resumed the stand.

Direct examination resumed.

By Mr. Klein:

Q. Mr. Riley, you were telling us before lunch about your going to the Hotel Taft in New York City on the evening of October 31.

A. Yes, sir.

Q. At that time will you tell us who you were looking for.

A. Albert Ralph Petti.

Q. And what were you looking for Petti for?

A. There were a couple of charges that were outstanding.

Q. Well, tell us one at a time, sir.

A. First we had received information he was a deserter from the United States Army.

Q. Was this in time of war?

A. Yes, sir, it was.

Q. And what was the second charge?

A. A bench warrant had been issued for him in Newark for an OPA violation.

Q. And do you know whether or not Petti had forfeited bail in connection with the bench warrant that was issued?

A. Yes, sir, I do.

[fol. 101] Mr. Halle: I object unless this witness knows of his own knowledge.

The Court: He says he does.

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Q. Will you answer it, sir?

The Court: He said he did. Go ahead.

Q. Did you actually have a copy of the warrant with you on the evening that you went to the Hotel Taft?

A. No, sir, we did not.

Q. But you knew that a warrant had been issued at the time?

A. Yes, sir.

Q. Previous to your going there?

A. Yes, sir.

Mr. Klein: No further questions.

Cross-examination.

By Mr. Halle:

Q. Previous to your going there, you or your brother agent had made an arrangement with the management of the hotel, had you not?

A. An arrangement had been made; I personally did not make it; that was my understanding.

Q. And the arrangements were made to have the manager of the hotel open this door of the room occupied by the defendant?

Mr. Klein: Just a minute——

The Court: That is repetition. He has said that already.

Mr. Halle: He has said that.

Mr. Klein: He said he did not make the arrangement. [fol. 102] The Court: He said he did not make the arrangement, but that before the entry was made it had been arranged, and that somebody had made the arrangement.

Mr. Halle: That is right. I have no further questions to ask.

The Court: Now you may argue the question.

(Witness excused.)

The Court: I mean what authorities have you, Mr. Halle.

(Argument on motion omitted.)

The Court: Well, gentlemen, I will be glad to read your brief, and glad to read the cases you have cited, but I am not going to hold up the jury at this time. I think you are

treading on pretty thin ice, generally, but I am going to look into it. I am not attempting at this time to decide it at all. It seems to be rather novel from all the cases that either of you gentlemen have been quoting, but I am going to proceed with the jury, and the same motion can be taken up and I will deny your motion at this time and you can renew it at the conclusion of the Government's case if you want to and when the entire evidence may be considered, and I will pass on it definitely at that time.

[fol. 103] Mr. Halle: If I should happen to find a case on the question may I have——

The Court: I will be glad to have you submit it.

Mr. Halle: I will try to do that overnight.

The Court: All right. Now call the jury.

Mr. Klein: Will your Honor then permit the introduction of these two exhibits?

The Court: Yes, I am going to at this time.

Mr. Klein: Subject to your Honor's ruling.

The Court: That is right.

(Jury returned to the courtroom.)

Mr. Klein: So the record is clear, your Honor, I am handing a copy of the brief I handed your Honor to my adversary.

Earl E. Riley resumed the stand.

Direct examination continued.

By Mr. Klein:

Mr. Klein: I ask the clerk to mark Exhibits 4 and 5 for identification into evidence subject to your Honor's ruling.

The Court: Are they marked?

Mr. Klein: They are marked for identification so far.

The Court: The objection is noted and objection overruled at this time.

(Government's Exhibits 4 and 5 for identification re-
[fol. 104] ceived in evidence.)

Q. I think when we recessed for lunch, Mr. Riley, I think you were discussing, in answer to my question, the telephone

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call from one d'Angelico, an occupant of Room 1556, do you remember?

A. Yes, sir.

Q. All right. Will you now tell us what happened as a result of that telephone call? By the way, was Petti present when the call came in?

A. Yes, sir, he was. The telephone call came into the room. As I said, Mr. Petti was present and Mr. Petti answered the phone and invited this individual, whom we later determined, on his entrance into the room, as Vincent d'Angelico. During our conversation with him there in Mr. Petti's presence, Mr. d'Angelico stated that he lived in the Taft Hotel, Room 1556.

Mr. Halle: I object to any reference—I ask that the fact be stricken, or that any conversation had with this d'Angelico, whether—regardless of the fact it was in Mr. Petti's presence, that he is not bound by it.

The Court: Is he named as one of the defendants?

Mr. Klein: No, I submit, your Honor, that conversation in the presence of the defendant——

The Court: But it is material that—I don't know where that is material.

Mr. Klein: Well, it may very well be, if your Honor [fol. 105] please, that is the reason why, if it were not material, I would not ask the question.

The Court: Objection overruled.

Q. I say at the very point of recessing for lunch, you were telling us about a question to Mr. Petti about the notebook which was put in evidence, do you remember that?

A. Yes, sir.

Q. What did you say to Mr. Petti and what did he say to you?

A. We asked him what the notebook was.

• • • • • • •

Q. Just tell us what you asked him and what he said to you.

A. I asked him what the notebook was. He said it was a list of his friends.

Q. Was there any question asked of Mr. Petti at that time in connection with the travelers' checks and money orders?

A. Well, at the time of this discussion the travelers' checks and money orders——

[fol. 106] Q. Yes.

A. Before we even opened the suitcase——

Mr. Halle: Pardon me. Your Honor, I take it that this evidence will be subject to whatever ruling your Honor will make on the question.

The Court: That is right; and your same objection shall apply as applied originally.

Mr. Halle: All right.

Q. Go ahead.

A. Before the suitcase was opened, before actually the checks were extracted, when asked what was in the suitcase Mr. Petti said that—he made the remark that if he had known this was going to happen, he would have gotten rid of the stuff, or gotten rid of it. He did not have—asked for the key, he said, "I don't have it." However, in his possession, those things we had removed from his person, we found the key which fit the suitcase. The suitcase was opened by Agents Pecks and Harrison and the back with the travelers' checks and money orders were extracted from that suitcase.

Q. Was any questioning directed to Mr. Petti at that time as to whose paper it was?

A. Yes, sir. We asked him whose it was and where it came from, and he stated that an individual by the name of Joe Bonn, also known as Joe Bonds or JB, had given it to him; he was also known as Albert Trinnell.

[fols. 107-123] Q. Do you know what the name of the occupant of the room was, or the registration?

A. The registration of the room was in the name of Albert Trinnell.

Q. How long did you stay in this room 340 at the Taft that evening or that morning?

A. We stayed there for approximately 45 minutes at the most.

Q. And d'Angelico left before you and the agents left?

A. Yes, sir.

Q. When you left the room, just who went out together?

A. All the agents—Agent Peck, Harrison, Gallon, Mr. Petti and Mr. Lomano all left together, and we left the hotel. Out on the street Mr. Lomano left us and the other

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agents and myself accompanied Mr. Petti to the FBI office here in New York City.

Q. In this very building?

A. Yes, sir.

Q. And what time did you arrive at the Bureau office in this building?

A. About two o'clock or shortly thereafter.

• • • • • • •

[fol. 124] Cross-examination.

By Mr. Halle:

Q. Now, when you got into the room before Petti got there——

Mr. Klein: He has not——

Mr. Halle: In the hotel room.

Mr. Klein: I am sorry to interrupt.

Mr. Halle: Thanks for helping.

Q. (Continuing:) —it was around 7.30, and you looked in the closet?

A. Yes, sir, we looked in the closets.

Q. And was the closet door open or closed?

A. I don't recall whether it was firmly pushed shut or—however, it was right in back of the door, as I recollect, so the door must have been somewhat closed.

Q. So, in other words, you had to open the closet door to see what was in there?

A. We did open the door, yes, sir.

Q. What?

A. The door was opened, yes, sir.

Q. I say you had to open the door to see what was in there?

A. Yes, sir.

Q. Correct?

A. Yes, sir.

Q. And did you search anything more before Petti got there?

A. No. We were looking for Mr. Petti. We looked in the closet, and he was not there.

Q. And you were not looking for the Exhibits 2 and 3 there at that time?

A. The exhibits 2 and 3 are the——

Mr. Klein: The travelers' checks and money orders?
[fol. 125] The Witness: No, sir; we did not know about them.

Q. Did not know anything at all about them?

A. That is right.

Q. Was there any other place in the room you were looking for Petti when you got in there?

A. We looked in the bathroom and under the bed.

Q. Did you tell us in your direct examination——

A. I was not asked that question.

Q. What question?

A. I thought you were putting the question did I say in my direct examination that we had looked in the bathroom.

Q. No, that is not the question.

A. I am sorry.

Q. Didn't you tell us in your direct examination that the arrangements were made with the hotel to go into the room—no, I will take that back. That was—I don't want to go into the other part right now. That is all.

The Court: Is that all for this witness?

Mr. Klein: No further questions. Thank you, Mr. Riley.

• • • • • • •

[fol. 126] Charles B. Peck, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

Q. Mr. Peck, what is your occupation?

A. I am a special agent of the Federal Bureau of Investigation.

Q. How long are you a special agent of the Bureau?

A. I have been a special agent of the Bureau about five and one-half years.

Q. And what office are you presently assigned to?

A. I am presently assigned to the New York office.

Q. And where were you assigned in October and November 1945 and April 1946?

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A. I was also assigned to the New York office at that time.

Q. I direct your attention to the 31st of October, 1945. Do you remember that day?

A. I do.

Q. Did you receive an assignment that day concerning some person?

A. I did.

Q. What was the name of the person?

A. Albert Ralph Petti.

Q. And did you go anywhere?

A. I did.

Q. Just tell us where did you go first.

A. I first went to the Taft Hotel, which was located at Seventh Avenue at the corner of 50th Street, Manhattan.

Q. Anybody accompany you?

A. Yes, sir.

[fol. 127] Q. Tell us who.

A. There were Special Agents Earl E. Riley, Moritz Gallon and Richard Harrison.

Q. Is Special Agent Riley the witness who preceded you on the stand?

A. Yes, sir, that is true.

Q. And did you know what office Riley, Gallon and Harrison were associated with at that time?

A. Yes, sir; Riley, Gallon and Harrison were associated with the New York office.

Q. Of the Federal Bureau of Investigation?

A. Of the Federal Bureau of Investigation.

Q. What time did you arrive at the Hotel Taft, Mr. Peck?

A. We arrived at the Taft approximately 7.30 p. m.

Q. Morning or afternoon?

A. 7.30 p. m. of that day, October 31, 1945.

Q. What did you do when you first got there?

A. When we first got to the Taft Hotel, having been advised that Albert R. Petti was registered at that hotel in Room 304 under the name of Albert Trinnell, I made a phone call from the lobby of the hotel, using the house phone, to Room 340, but received no answer.

Q. What did you do next?

A. Next Special Agents Harrison and Gallon took up positions in the lobby of the hotel and Special Agent Riley and I, accompanied by assistant manager Douglas Murray,

[fol. 128] went to Room 340. Assistant manager Murray volunteered to let us in to Room 340, which he did, but prior to our entering the room assistant manager Murray rapped on the door.

Q. And then did Murray open the door with a passkey?

A. Murray opened the door with a passkey or master key.

Q. And did you and Riley go in?

A. Murray stayed outside and Special Agent Riley and I entered the room.

Q. And did you not lock the door behind you?

A. We did not lock the door behind us; assistant manager Murray locked the door upon our entering the room.

Q. Now, what did you do when you got in the room?

A. Special Agent Riley and I waited in the room for the arrival of Mr. Petti.

Q. Did you look anywhere in the room for Petti at that time?

A. Yes, sir; as soon as we entered the room we made a search simply to find out whether Petti was in the room.

Q. What did you do?

A. We looked into the lavatory which is in the room and into the closet, I believe, that is in the room.

Q. Anything else that you remember?

A. Well, I seem to remember that we looked under the bed also.

Q. You stayed in the room after that from about 7.30 p. m. until the time Petti arrived?

A. That is right. That was shortly after 7.30 p. m., un-[fol. 129] til the time that Petti arrived.

Q. What time did he arrive?

A. He arrived about 1.30 in the morning.

The Court: That is the next morning, November 1st?

The Witness: Yes, sir.

Q. Was anybody with him?

A. Yes, sir; there was a man with him who calls himself Anthony Lomano.

Q. Did Petti let himself in with a key, or did Lomano have the key?

A. Petti let himself in with the key; Lomano came in with him.

Q. Now what happened after Petti came into the room?

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A. When Petti arrived in the room Special Agent Riley and I put Petti under arrest in the presence of Anthony Lomano. Special Agent Riley then called the lobby and summoned Special Agents Harrison and Gallon.

Q. Do you know how many entrances there are to the Hotel Taft?

A. No, sir, I do not.

Q. Is there an entrance on Seventh Avenue?

A. Yes, sir, there is an entrance on Seventh Avenue.

Q. Is there one on 50th Street?

A. I believe there is.

Q. And you received no report from Harrison or Gallon that they observed Petti entering the hotel?

A. No, sir, we received no such report.

Q. All you did was notify them to come up, or Riley did?

[fol. 130] A. Yes, sir.

* * * * * * *

Q. Well, you searched the person and the room, did you not?

A. We searched the person and the room, yes, sir.

Q. And did you identify yourself to Petti at the time you placed him under arrest?

A. At the time of the arrest, yes, sir.

Q. And were you able to ascertain his identity then?

A. Yes, sir.

Q. Tell us what happened in the room, just what you did, what was said, if anything, what Petti said if anything, from that time on.

A. We began our search of the room, and during this search a small black notebook was discovered among Petti's personal effects. Special Agent Riley discovered this notebook.

Q. I show you Government's Exhibit 5 in evidence. Do you recognize that book?

A. Yes, sir, I do.

Q. And is that the book that you are talking about?

A. Yes, sir.

Q. Go ahead, Mr. Peck.

A. While we were searching the room the telephone in the room rang and Mr. Petti, with our permission, answered [fol. 131] the telephone, and it was Vincent d'Angelico. Mr. Petti advised d'Angelico that he would like to have

him come up to the room, and a few minutes later on d'Angelico arrived at the room. He identified himself as Vincent d'Angelico.

Q. Did he tell you where he was staying?

A. Yes, sir, he said that he occupied Room 1556 at the same hotel, the Taft Hotel. After a few minutes we ceased talking to Mr. d'Angelico and Mr. d'Angelico left. We continued with the search of the room, and in so doing Special Agent Harrison and I found in the closet of the room a suitcase which Petti said was his suitcase. We asked him whether there was anything in the suitcase, and he said nothing, there was nothing in the suitcase. However on tilting the suitcase slightly I heard a sliding sound in the bottom of the suitcase, and realizing there was something in the suitcase, asked Mr. Petti for the key to the suitcase.

Q. Did Petti say anything at that point?

A. Yes, sir; Mr. Petti said that he had lost the key, did not have the key. So we searched the personal effects of his which, as I recall, were spread on the bed at the time, and discovered a key which he identified as the key to this suitcase. Just before opening the suitcase Mr. Petti was heard to remark——

[fol. 132] Mr. Halle: I object to it, unless the witness says he heard it.

The Court: Yes.

Q. Did you hear it?

A. I heard him say this, yes, sir.

Q. Tell us what he said.

A. I was trying to get it correct. He said, "If I had known this was going to happen I would have gotten rid of that stuff."

Then using the key I opened the suitcase, and Special Agent Harrison and I took from the suitcase a small brown paper bag in which were a group of travelers' checks and money orders in book form.

Q. I show you Government's Exhibit 4 in evidence. Would you look at that brown paper bag?

A. Yes, sir.

Q. Do you recognize it?

A. I do, sir.

Q. How do you so recognize it?

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A. I recognize it by the fact that I placed my initials and the date—it was then 11/1/45—on the bag.

Q. And where does that appear?

A. That appears on the bottom of the bag.

Q. And did you do that in the presence of Petti and the other agents?

A. I am not sure that Petti was present at the time. That was not at the time of the arrest, but shortly thereafter, and the other agents I am pretty sure were there.

Q. And I show you Government's Exhibits 2 and 3 in [fols. 133-150] evidence.

A. Yes, sir.

Q. Do you recognize those exhibits?

A. Yes, sir, I do recognize those exhibits.

Q. Where were they?

A. Those were the travelers' checks and money orders which were folded up and placed in this bag.

Q. Go ahead with your story.

A. After we had taken the travelers' checks and money orders in the brown bag out of the suitcase we asked Petti to whom these travelers' checks and money orders belonged. He said that they belonged to a gambler, a bookie by the name of Joseph Bonn also known as Joe Bonds, JB and Albert Trinnell. He said at that time that Joseph Bonds had put these travelers' checks and money orders in the suitcase without his knowledge, and that he had not known they were there until he opened the suitcase some time later and found them there. We asked him regarding the whereabouts of JB or Joseph Bonds, and he said that he did not know Bonds' exact whereabouts but believed that he had heard that Bonds had gone to Boston. Having completed the search of the room we permitted Petti to use the suitcase in question to pack his belongings, which he did, and then Mr. Lomano left our company.

Q. Where did Lomano leave?

A. Well, Lomano left us on 50th Street.

[fol. 151] New York, December 10, 1947;
10.30 o'clock a.m.

TRIAL RESUMED

The Court: You may call a witness.

ELMER VAN BUSKIRK, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

Q. What is your occupation, sir?
A. I am the chief auditor at the Hotel Taft.
Q. Where is the Hotel Taft located?
A. 50th Street and Seventh Avenue, New York City.
Q. And how long are you connected with the Hotel Taft?
A. Since 1933.
Q. Briefly what are your duties, Mr. Van Buskirk?
A. I keep record of all the accounts at the hotel.
Q. Are you familiar with all the books, documents and records of the hotel?
A. Yes, sir.

Mr. Klein: Will you please mark this exhibit for identification.

(Government's Exhibit 7 marked for identification.)

Q. I show you Government's Exhibit 7 for identification, [fol. 152] Mr. Van Buskirk. Do you recognize that document?
A. Yes, sir.
Q. Is that a photostatic copy of documents that are kept by your hotel in the ordinary and regular course of business there?
A. It is.

Mr. Klein: I offer it in evidence.
The Court: Any objection?
Mr. Halle: No objection.
The Court: It may be admitted.

(Government's Exhibit 7 for identification received in evidence.)

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(Mr. Klein exhibits and describes Exhibit 7 to jury.)

Mr. Klein: Will you please mark this exhibit for identification.

(Marked *Government's Exhibit 8 for identification.*)

Mr. Klein: And also mark this exhibit for identification, sir.

(Marked Government's Exhibit 9 for identification.)

Mr. Klein: Does your Honor want to see the exhibit I handed to the jury?

The Court: No, that is perfectly all right.

Q. Mr. Van Buskirk, will you tell us the method of making long distance telephone calls from the occupants of rooms at the Hotel Taft?

[fol. 153] A. When a call is made by a guest in the hotel it is given to our operator, our long distance operator, who immediately records this in a pad known as "Telephone Traffic Sheet." That traffic sheet records the name of the guest, the room that he occupied, the call that he is making, the time he makes it and the length of time he made the call. That call—the duplicate of that is kept as a permanent record, the original is sent to the front office cashier for charging the guest's account of that particular call.

Q. I show you Government's Exhibits 8 and 9 for identification. Do you recognize those two documents?

A. I do.

Q. Are they documents prepared by your hotel and kept in the regular course of business?

A. They are.

Q. As to the testimony you just gave about long distance telephone calls?

A. That is correct.

Mr. Klein: The Government respectfully offers Exhibits 8 and 9 for identification into evidence.

Mr. Halle: I object to it, if the Court please, upon the ground it does not appear to have any relation at all to the issues in this case.

The Court: What is the purpose of the exhibit, the use of the room, or do you expect to connect it up?

Mr. Klein: Yes, your Honor, a telephone call mentioned [fol. 154] on each sheet from the occupant of Room 340.

The Court: Is that the only purpose?

Mr. Klein: That is the purpose of it.

The Court: It may be admitted for that purpose, and that purpose only. Objection overruled.

(Government's Exhibits 8 and 9 for identification received in evidence.)

Mr. Klein: Members of the jury, Government's Exhibit 8 in evidence reflects a number of telephone calls. The one that the Government is interested in is this Humboldt 3-8978. It appears to have been made from Room 340 on the 23rd.

Q. Can you tell us the month?

A. Yes, sir; it is time stamped October 23rd.

Mr. Klein: On October 23rd; the time stamp indicates the exact hour and minute when the call was made from Room 340.

The Government's Exhibit 9 in evidence likewise reflects a call. By the way, the occupant of the room is reflected as Trinnell. On Government's Exhibit 9 in evidence the occupant of the room is reflected as Trinnell 340 and to Humboldt 3-8978 on the 28th.

Q. Can you tell us what month—oh, I see, October 28 at 7.17 the first call mentioned is at.

[fol. 155] By the way, I notice, Mr. Van Buskirk, that there are four calls on each sheet.

A. That is correct.

Q. Is that the way the form is prepared?

A. That is correct; the long distance voucher pads are made up in 4-voucher pads.

Mr. Klein: You may inquire.

Cross-examination.

By Mr. Halle:

Q. Trinnell—the man who said he was Trinnell was the occupant of that room?

A. I beg your pardon.

Q. The man—this shows the registration of Albert Trinnell for this Room 340?

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A. Yes, sir.
Q. Right?
A. Yes, sir.
Q. That was his room?
A. Yes, sir.

Mr. Halle: That is all.

Redirect examination.

By Mr. Klein:

Q. Do you know who Trinnell was?
A. I don't know.
Q. Did you ever see him?
A. Never saw him before in my life.
Q. Do you know whether that was his right or wrong name?
A. I could not say that; all I know is that that was the registration for that particular room on that particular date.

Mr. Klein: Thank you, sir, no further questions.

* * * * * * *

[fol. 156] MARTHA MILDRED MARION, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

Q. Where do you presently reside, Mrs. Marion?
A. In Parsippany, Tri Hills.
Q. Is that in New Jersey?
A. In New Jersey, yes.
Q. And are you employed or a housewife?
A. A housewife.
Q. And in the latter part of 1945, particularly October of 1945, where did you reside?
A. 129 Mt. Pleasant Avenue, Newark.
Q. And do you know who occupied No. 133 Mt. Pleasant Avenue in Newark?

A. Yes.
Q. Do you know the name of the people there?
A. Rosenberg.
Q. And did you have a phone at 129 Mt. Pleasant Avenue?
A. I did.
Q. Will you please tell us the phone number.
A. Humboldt 3-8978.
Q. And was that a private phone or a pay station?
A. A pay station.
Q. Did you receive calls on that phone for your neighbors?
A. I did.
Q. Will you tell us what neighbors you received calls for.
A. Well, for Rosenberg.

[fol. 157] Mr. Halle: I object, if the Court please, as not binding on this defendant.
The Court: Objection overruled.

Q. Will you answer that question, please?
A. Rosenbergs and for different people in my home. I had a rooming house; and other people from our house.
Q. Now, particularly with reference to Rosenberg, how frequent were those calls?
A. Oh, quite frequent.
Q. Do you remember any names that were used by persons calling?
A. Well, I would call them and then Mrs. Rosenberg would come and take the message. If she could not come over or he could not come over then I would take the message, and then they just told who it was.
Q. And did you hear the name Doc?
A. Yes.

Mr. Halle: I object to that, if the Court please.
The Court: Objection overruled; she has answered.

Q. Will you answer the question; do yon remember a name Doc ever being used?
A. Yes.
Q. And did you deliver that message that Doc had called?
A. That Doc had called——

Mr. Halle: I ask that that be stricken out as not binding upon this defendant.

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[fols. 158-177] The Court: Objection overruled, motion denied.

Q. Can you tell us, Mrs. Marion, how late or how early in the day calls for Rosenberg came into your home?
A. Well, different times during the day. If I had any time I would go over and get them or call them.
Q. Did you ever receive any long distance calls where the operator told you that it was a long distance call?
A. Yes.
Q. And what was your phone number again?
A. Humbolt 3-8978.
Q. Humbolt 3-8978?
A. That is right.
Mr. Klein: You may inquire.

Cross-examination.

By Mr. Halle:

Q. Did you ever see this defendant?
A. No, I have not.

* * * * * * *

[fol. 178] Richard A. Harrison, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

Q. Mr. Harrison, what is your occupation?
A. I am a special agent of the Federal Bureau of Investigation.
Q. How long are you so assigned, Mr. Harrison?
A. I have been with the Federal Bureau of Investigation for approximately 10 years.
Q. What office are you presently assigned to?
A. Newark, New Jersey.
Q. In October and November 1945 what office were you assigned to?
A. Newark, New Jersey.

[fol. 179] Q. I direct your attention to the date October 31, 1945. Did you receive an assignment on that day?

A. Yes, sir, I did.

Q. Did you go anywhere.

A. Yes, sir.

Q. First, who accompanied you, sir?

A. I was accompanied by Agent Riley—Earl Riley and Moritz Gallon.

Q. And did you meet anyone else?

A. And we met Agent Peck over in New York.

Q. Do you know what Bureau offices Riley and Gallon were attached to?

A. They too were assigned to the Newark, New Jersey office.

Q. And do you know what office Peck was assigned to?

A. Peck was assigned to the New York office.

Q. After you four got together where did you go?

A. We went to the Taft Hotel in New York City.

Q. And what time did you arrive at the Taft Hotel, approximately?

A. Approximately 7.30 p. m.

Q. On the evening of October 31?

A. That is correct.

Q. What did you do when you got to the Taft Hotel?

A. Agent Gallon and myself stationed ourselves in the lobby of the hotel and Agents Riley and Peck went on upstairs.

Q. Do you know where they went to?

A. At that time I did not know the exact room number.

[fol. 180] Q. You did or did not?

A. I did not know the exact room number.

Q. Who were you looking for?

A. We were looking for an individual by the name of Petti.

Q. Do you know his full name?

A. Alfred or Albert Petti.

Q. Alfred or Albert?

A. Albert Ralph Petti, that is correct.

Q. And what time did Peck and Riley leave you to go upstairs?

A. Approximately 7.30. They went right on up.

Q. Where did you station yourself?

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A. I stationed myself at the lobby of the hotel. It is pretty hard to describe, but up to the right from the elevator banks.

Q. How many entrances are there to the Hotel Taft?

A. I think there are about four.

Q. Do you know where they are located particularly?

A. I am not too familiar with the streets in New York City; I don't know.

Q. Well, are there some on the Seventh Avenue entrance?

A. As I say, I don't know exactly locations as to streets.

Q. All right. Is the hotel on a corner?

A. Yes.

Q. And are there entrances on both sides?

A. That is correct.

[fol. 181] Q. Where did Gallon station himself?

A. Well, he stationed himself at another part of the lobby there. We tried to cover the entrances of the lobby in the best possible way.

Q. Did you have a description of Petti—some description of Petti?

A. Yes, we had read over the description of the individual.

Q. How long did you stay in the lobby of the Taft before you received—before something happened?

A. Until approximately one a. m. of November 1st.

Q. Did you leave the Taft at any time?

A. No, we did not.

Q. Did Gallon leave the Taft?

A. No, sir.

Q. Did Riley or Peck come downstairs from whatever room they were in?

A. No, sir.

Q. What happened at or about one a. m. in the morning?

A. Approximately one a. m. I received a call, there is a booth in the lobby there, there was a call from Mr. Riley who told us that we should come up to Room 340.

Q. Up to that point had you seen Petti pass you in the lobby?

A. No, I had not.

Q. And do you know whether Gallon had seen Petti pass him?

A. Definitely not.

Q. Did you go upstairs?
A. Yes, sir.
Q. What room did you go to?
A. We went to Room 340.
[fol. 182] Q. What did you observe when you went in to Room 340?
A. At that time we found Agents Riley and Peck.

Mr. Halle: I make the same objection as I have previously to this testimony.
The Court: Objection overruled.
The Witness: We found Agents Riley and Peck along with Petti and another individual by the name of Lomano.

Q. Do you see the person in court who you saw in Room 340 as Petti?
A. That is Petti right there (indicating).
Q. Which one, sir?
A. Right in the middle there, sitting at the counsel table.

Mr. Klein: May the record indicate that the witness identified the defendant Albert Ralph Petti.

Q. Now tell us what happened in the room.
A. At that time we began to search the room as to the personal effects and what have you.

Mr. Halle: Keep your voice up, please.
The Witness: All right, sir.

A. (Continuing.) We searched the room, and the personal effects of Petti at that time I believe were on the bed, and in the closet bathroom we found a suitcase which was locked. We asked for the keys, as I recall, and Petti denied having the keys, and among the personal effects on [fol. 183] the bed we found a key which did fit the suitcase, and when we asked what was in that thing he disclaimed any knowledge there, and when it was shaken it was obvious that there was something in the suitcase, and when it was over we found a paper bag and in this paper bag we found some American Express travelers' checks and money orders.
Q. Did Petti say anything at that point?
A. At that point we asked him what was in there. He said well, had he known this was going to happen, sir, I would have gotten rid of that stuff.

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Q. I show you Government's Exhibit 4 in evidence. Do you recognize that bag?

A. Yes, sir, that is the bag.

Q. Are there any initials on there?

A. As I recall, I think Agent Peck initialed these things at the time we picked them up. Yes, that is correct.

Q. Were those initials put on here——

A. Those are the initials of Agent Peck.

Q. I show you Government's Exhibits 2 and 3 in evidence. Do you recognize those documents?

A. I recognize these as being the checks that were found that evening. They have all been initialed by Agent Peck.

Q. And how about the money orders?

A. The money orders too have been initialed by Agent Peck.

Q. Did you find anything else?

A. Of course we found some personal effects, and over [fol. 184] there we have a notebook that was found among the personal effects of Petti.

Q. I show you Government's Exhibit 5 in evidence. Do you recognize that?

A. That is the book, which has been initialed by Agent Riley.

Q. Was there any conversation between you or the other agents and Petti at or about this time?

A. Yes, during the time we were in that room a phone call was received, and we had Petti answer the phone. We told Petti to tell whoever was on the line to come up to the room and not say anything more.

Mr. Halle: And not say what?

The Witness: Not say anything more. We just told him to say to come up to the room. And a few minutes later another individual appeared there, who identified himself as being Vincent d'Angelico, and we identified him through his draft cards and personal identification, and at that time we determined that he also stayed in the hotel and was living in Room 1556.

Q. Did d'Angelico leave the room thereafter?

A. Yes. We had nothing to hold d'Angelico for.

Q. And what else happened in the room? Was this all in Petti's presence?

A. Yes, sir.

Q. What else happened in the room?

A. Well, then we packed all Petti's personal effects.

[fol. 185] Q. Was anything said about the——

Mr. Halle: I object to counsel broaching the witness.

Mr. Klein: I haven't finished the question.

The Court: Yes. But keep away from leading the witness the best you can.

A. I don't recall.

Q. Just tell us what else was said.

A. I don't recall of anything else having been said, other than the fact that Petti indicated that he would have gotten rid of that stuff.

Q. Was there any talk about the ownership of the——

Mr. Halle: I object to the question, if your Honor please.

The Court: No, objection overruled.

A. Oh yes, yes.

Q. Referring to Government's Exhibits 2 and 3.

A. At that time he indicated that they belonged to an individual——

Mr. Halle: I move to strike that out.

The Court: No, that may be stricken, not what he indicated. What did he say?

Q. What did he say?

A. He said that that evidence there belonged to an individual by the name of Joe Bonn or Joe Bonds and said that he——

[fol. 186] Q. Did he mention any other names?

A. And Albert Trinnell, I believe; and he indicated that that individual had left, had gone to Boston, or something like that, and had indicated that he would come back and pick that up, but that he had never returned.

Q. Do you recollect anything else that was said at that time if anything else was said?

A. I don't recall anything else.

Q. And did you you leave the room?

A. We then had Petti pack his personal effects in this suitcase and we all left the room. We——

Q. Where did you go?

A. We went downstairs, and of course we went out in the street where we released Lomano, and then we traveled

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to the New York Federal Bureau of Investigation office, and it is located right in this building.

Q. And how long did you stay in the hotel room 340 from the time you were called and went upstairs until the time you actually left the room?

A. It was approximately a quarter to two when we left the hotel room.

Q. And what time did you arrive at this building?

A. Well, shortly thereafter.

Q. Approximately?

A. I figure about 15 or 20 minutes, something like that.

Q. Was there any conversation with Petti in this build-
[fol. 187] ing in your presence?

A. Well, I did not personally question Petti.

Q. Were you present when such took place?

A. I was present when there were questions, yes.

Q. And what was said by Petti, what did he say?

A. Well, frankly offhand I can't think of what he said, because I at that time was, I believe, making a list of the different Express travelers' checks and money orders there. I did not question him.

Q. When you went to the Hotel Taft had you received any instructions as to who was occupying Room 340?

A. We were of the impression that that was occupied by a Trinnell and that——

Q. And was there any question asked of Petti in connection with that?

Mr. Halle: What is that again? What is the question?

The Court: Read the question.

Q. (Read.)

The Court: You may answer.

A. We had information, you might say, that Petti was living at that hotel, but we did not know, did not identify him as being actually Trinnell at the time.

Q. Did you learn later that Petti was Trinnell?

A. I believe he at the New York office admitted that he
[fol. 188] was Trinnell.

Q. Up to that point you did not know that?

A. That is correct.

Mr. Klein: You may inquire.

Cross-examination.

By Mr. Halle:

Q. You say that you did not know before you got to the hotel that Petti was Trinnell?

A. That is correct.

Q. And did you know what room in the hotel you were to go to?

A. At the time I did not know. I was stationed in the lobby of the hotel.

Q. But your brother officers knew that, didn't they?

A. That is correct.

Q. And when all four of you got to the hotel, two of you remained downstairs, right?

A. That is correct.

Q. And two went upstairs?

A. Yes.

Q. They immediately went upstairs, right?

A. That is correct.

Q. Without stopping off anywhere, right?

A. Well, I don't know whether they stopped off. We had instructions to go and station ourselves.

Q. I am just asking you.

A. Well, I gave the fact; I don't know whether they stopped off or not.

Q. Did they go directly upstairs?

A. I believe they went directly upstairs.

Q. Without stopping off?

A. They may have stopped by the cashier's desk, I don't [fol. 189] know.

Q. You don't know?

A. No.

Q. And did you know where upstairs they were going to?

A. No, sir, I did not know the room number.

Q. But you knew they were going to a certain definite room number?

A. Well, they obviously were.

Q. Obviously, yes. And who of you four agents had charge of this expedition?

Mr. Klein: That is objected to, if your Honor please.

The Court: No, he may answer.

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A. Agent Riley had the case assigned to him over in Newark.

Q. Now, when you got up in the room that night and saw Petti there had the search started yet of the room?

A. Well, they had taken away his personal effects and undoubtedly looked through the other adjoining rooms, such as the bathroom.

Q. But in your presence who did the searching?

A. In my presence?

Q. Yes.

A. I aided in the search.

Q. Won't you tell us what you did in the search there?

A. Well, I aided in that, I looked through the room, of course, and in this closet I found the suitcase, in the closet. Peck and I happened to be there at the same time, [fol. 190] as a matter of fact he pulled it out of the closet, I didn't.

Q. Who opened the door to the closet?

A. Agent Peck.

Q. Agent Peck opened the door?

A. That is correct.

Q. And the closet was behind the hall door?

A. The entrance door.

Q. The entrance door; and there was only one entrance to this room, I take it?

A. Yes, sir.

Q. And the door to the closet was closed and Peck opened it, right?

A. Well, I presume that it was. That is, I don't know.

Q. And you found this suitcase and somebody started to shake it?

A. That is right.

Q. Who was it that did the shaking?

A. Agent Peck picked the suitcase up and shook it back and forth.

Q. And it was locked?

A. And it was locked.

Q. And Petti denied that he had the keys to the suitcase?

A. That is right.

Q. So you found the keys amongst the personal effects that you had—that some one of you four agents had taken previously from Peck?

A. That is correct.

Q. And opened it?

A. That is correct.

Q. And you also heard this remark by Petti, had he known what was going to happen he would not have [fol. 191] had it there—what did he say again?

A. He said "If I had known this was going to happen I would have gotten rid of that stuff."

Q. And besides the closet and the bathroom, where else did you look?

A. Well, of course we searched through the bureau drawers, dresser drawers, and searched under the bed.

Q. You searched every place and everywhere that you could think of for whatever you might be able to find?

A. True.

Q. Right?

A. Yes, sir.

Q. When you were downstairs in the lobby did you and Gallon remain in the same spot, or did you take opposite posts?

A. Well, we tried to cover the entrances, sir.

Q. Well, that is a very big lobby, isn't it?

A. It is; we found that after we got over there.

Q. And you don't know whether Gallon saw Petti come in or not?

A. Well, had he seen him he would certainly have contacted me.

Q. I know you are assuming that as a good officer.

Mr. Klein: I would like the answer to the question recorded by the stenographer without Mr. Halle interrupting.

The Court: The answer may be stricken. Now I think he may answer the question, the original question, if you [fols. 192-212] will read that, Mr. Reporter.

Q. (Read.)

Mr. Klein: Will you answer that?

A. No, I do not.

Mr. Halle: That is an answer.

That is all.

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[fol. 213] Mr. Klein: At this time the Government rests, if Your Honor please.

[fol. 214] The Court: The jury may retire until recalled by the Court.

(The jury left the courtroom and the following took place in their absence:)

Mr. Halle: May it please the Court, I will first address myself——

The Court: Just a moment. Is there anything before the Court just now? Perhaps you had better for the record——

Mr. Halle: I anticipated too much. I move to dismiss the indictment and for a judgment of acquittal and for a directed verdict of acquittal upon the ground that the Government has—I will withdraw that.

MOTIONS

I now move to renew my motion to strike out all of the evidence pertaining to Exhibits 2 and 3 and that Exhibits 2 and 3 be stricken from the evidence. I further move for a judgment of acquittal and for a directed verdict of acquittal and for a dismissal of the indictment upon the ground that the Government has failed to make out a case. And on that, if your Honor will indulge and let me argue, I would appreciate it.

The Court: Very glad to hear you.

(Argument on motion omitted.)

The Court: I will agree with you on that, Mr. Halle, I [fol. 215] think that is correct, that anyone who would sign that particular article would be committing a forgery or he would be obtaining money to which he was not entitled.

I do, however, believe that in these particular travelers' checks, where there was nothing to do except for somebody to sign his name twice, or sign some other person's name twice to make them commercial, would be deemed of value. I appreciate the frank expression of the district attorney, who says he has some doubt about the other. I had, too, because the other had no value until it was countersigned and until the particular issuing officer had directed its issuance by a signature and otherwise. So I am inclined to believe that the money order might not have had any value, because the issue was not complete so far as the company was concerned.

To me there is a difference. The travelers' check was complete, so far as the company was concerned, the person who attempted to obtain the money under those checks was supposed to have signed them in the presence of an issuing officer. However, there was nothing, as I understand it, on the travelers' checks which shows any particular action on the part of the issuing officer to the checks that have been signed at the upper lefthand corner.

[fol. 216] And I do believe that there is quite a difference between the value that might be expressed in the difference between a money order and a travelers' check. The money order had not been completed, so far as your testimony shows, at the time they were stolen; the travelers' checks might have been considered by anyone who received them as having them completed by the issuing officer at the time they were presented for payment.

And so for that reason I believe that the particular subject known as the travelers' check is worthy of consideration and had a value at the time they were transported or stolen.

The other question, gentlemen, is one of the most serious questions that this Court has been called upon to decide for some time. I have spent considerable time trying to find out in my own mind or reach a determination from my own theory of what the law should be on this particular question that confronts us at the present time, and that is a search under a process of arrest that occurred in a hotel room that was evidently rented by the defendant, and into which admission to the officers was given by the management of the hotel.

I have spent some time the last twenty years of my life largely in hotels, and that experience is no different than [fol. 217] experienced by any other person. I can't find in my own examination of this particular question, in addition to the search that has been made by both of you gentlemen, any case that seems to me directly in point. About every case I have read says somewhere in the course of the opinion that every case sets more or less on its own bottom and that the facts upon which the law has been settled in that particular case may be an entirely different set of facts than occurs or appears in another case.

It seemed quite odd to me that this particular question, with the exception of these cases that have been cited that were the old search and seizure in the bootlegging days,

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which I will agree with counsel is somewhat different than the case before us, and has not been directly passed upon by some court of higher authority. The question is whether or not a transient room that you order and live in is a residence. I cannot quite agree with counsel for defendant that those premises are not transient. They are transient just the same as the room that I occupy at the present time is transient. When I entered the hotel I was required to fill out a statement of my residence, where I live, as was done here. I am more inclined to think that a hotel room is a place of accommodation more than it is a residence. [fol. 218] Some courts might hold, because after all the one who passes upon this question is a human being, and passes on a question of this sort, I should say, largely from his own interpretation of common sense, and none of us agree on our interpretation of common sense, but I, from my viewpoint, can't help but feel that a hotel room, for which many keys are circulating about the hotel, by both employees and management, is quite different from a residence in which you live. I can readily see a distinction between one who occupies hotel rooms as a suite rented from month to month or year to year and a person who enters the hotel and asks for an accommodation. I can't believe that that sort of a place is a residence. I have lived in one for about two weeks, and it certainly is not my home, and I know when I leave that hotel temporarily that anyone among the employees or management has a right to go into it with as many guests as they want to. I don't expect them to disturb the property in there, but other than that I have never complained and I do not think other transients complain about such matters. If a transgression is committed, or a violation of law, there cannot be any question that with or without a warrant any of the managers of that hotel has a right to see into it. I believe therefore that there is a difference. And I am not now charging counsel for [fol. 219] defendant with a motion that is trivial. I do not think it is a trivial motion, I think it is an important one, and I think it is a matter that is entitled to be passed upon not only by this Court but any other court which counsel feels entitled to pass upon it, but I just can't see a hotel room the same as I would see a private mansion of the possessor. And therefore if it was not that, and these men gained entrance there peacefully, of course counsel for

defendant challenges the legality of it, but if peacefully they obtained entrance to this room and there they waited, whether it was done for the purpose of evading, on the part of the Federal Bureau of Investigation, and the cause just decided here by one of the District Judges a few weeks ago, in which it was said that no search was possible unless the arrest was made within the premises—I have here the opinion that I think was handed to me by counsel, in which the men were arrested outside, led back into the residence and then a search was made, and the Court very rightfully, in my opinion, held that such a search was in violation of his constitutional rights, because that, of course, was his residence where he lived, it was his property contained within it, and the Constitution does not permit that sort of a search—whether it was to avoid that sort of an opinion [fol. 220] or not, this Court could at best only guess; but nevertheless, they entered this place peacefully and sat within the premises and waited until the defendant returned. When he returned they made the arrest. Under which charge the arrest was made, I don't know, whether they made it under the charge of a bench warrant down in New Jersey, or whether they made it under a charge of desertion. It seems to me there has been some confusion in regard to that. But say it was on either of those charges, they then, of course, had a right to search the person, had it been on the street or anywhere else. And that was done in this case, and they were within this particular room, and then they searched the room. I agree with counsel the time it took or anything of that sort is immaterial. They did search the room and in that search they found these certain papers and took them along. They were not there, of course, for the purpose of searching for this stolen property. They knew nothing about it, as I understood their testimony, but in the search they found this property which was, in common parlance, "hot", and took it along with them. They asked and inquired of defendant where he got it, and he made certain statements, according to the testi- [fols. 221-222] mony, the property was held and retained at the Federal Bureau of Investigation and brought here in this case, and the question now arises under this objection.

Believing as I do that there is a difference, that it was not a home, that it was not his domicile, it was not his residence but was a mere accommodation for which he paid for by the day, that the constitutional right of a man's domicile

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is not invaded by this particular matter, that the arrest was properly made, and that the search was legal for that reason, the Court holds that the particular travelers' checks had value, that the jury will be instructed to disregard that part of the indictment which charges the theft of the express money orders, the record may show that that part of the charge in the indictment is stricken and there remains for the consideration of the jury only the question, Were the American Express Travelers' Checks of the value of $5400. The motion to dismiss the defendant because the evidence does not justify going to the jury, on the ground that the two exhibits, 2 and 3, were improperly and unlawfully obtained, is denied, and the case may continue to trial on the part of defendant's counsel.

I think you may call the jury in.

[fol. 223] The Court: The defense may proceed.

MOTION

Mr. Halle: May it please the Court, the defendant rests and renews the motions made with regard to the evidence and on the law of the case made at the end of the Government's case.

The Court: The motion is denied.

Mr. Halle: Exception.

The Court: Thirty minutes for summation on each side, is that satisfactory?

Mr. Halle: That is satisfactory.

Mr. Klein: Approximately 30 minutes.

The Court: You may proceed.

(Mr. Halle summed up to the jury on behalf of the defendant.)

(Mr. Klein summed up to the jury on behalf of the Government.)

[fol. 224] (Dec. 11, 1947.)

CHARGE OF THE COURT

ADAIR, J.:

The Court: Lady and gentlemen of the jury: As you doubtless are aware at this time, because of the trial to which you have just listened, this is a criminal prosecution, based upon an indictment found by a Federal Grand Jury,

properly impaneled, in this district, against two defendants, one Charles Rosenberg and Albert Petti, the defendant Petti now on trial.

The charge is one of transporting unlawfully things of value or securities of more than $5000 from one State to another. There can be no misconception of the offense in this case. If he is guilty of that offense, it must have been the transportation from New Jersey to the State of New York, without any comment on the part of the Court, because that is the only charge laid in the indictment. He is not, as has been suggested, charged with the receiving of stolen property or having stolen the property. To be guilty of the charge brought against him you must believe that he transported it in interstate commerce from the State of New Jersey to the State of New York, property of the value of [fol. 225] $5000 or more, knowing said property to have been stolen.

The indictment in this case is no evidence whatever of the guilt of the defendant; it is a mere charge upon which the defendant is now being tried, apprising him of the charge brought against him and confining the Government to the charge alleged.

I purposely make no suggestion of a punishment that might be inflicted in case of a verdict of guilty, for after all that is solely the obligation of the Court and the responsibility of the Court. Your responsibility is entirely based upon the guilt or innocence of the defendant.

The defendant is, in the outset of this trial presumed to be innocent of the charge found in this indictment, and that presumption should remain with him throughout this trial in your minds until and if the time arrives throughout this trial that you believe the defendant has been proved guilty beyond a reasonable doubt of the charge alleged.

It is sometimes difficult to define a reasonable doubt, but I have always believed it is best defined in the term itself. It must be a reasonable doubt based upon the evidence in this lawsuit, such a doubt as is sometimes described as one [fol. 226] which would cause a reasonable and prudent person to hesitate and pause before acting upon the graver transactions of life. It is not a possibility of a doubt or a shadow of a doubt or a doubt that you might desire to invoke from sympathy or a desire to acquit, but it must be a reasonable doubt based upon the evidence that you have heard in this case; and before you should find the defendant

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guilty of the crime charged, you must believe that all the material allegations of this indictment have been proved to your satisfaction and beyond a reasonable doubt.

You are the sole judges of the testimony that you have heard in this courtroom. You have had an opportunity to view and see each of the witnesses that appeared before you. You have had an opportunity to determine in your own mind any interest or bias that any of these witnesses may have displayed. You have a right to take into consideration their interest in the outcome of the particular lawsuit and whether or not any of those witnesses have been impeached by other credible witnesses in the case; and if they have been so impeached, you have the right to disregard the testimony of that witness entirely, unless corroborated by other credible evidence in the case.

[fol. 227] It is not the purpose of this Court to express in any way, from inference or otherwise, his opinion of the testimony that has been heard. I have always believed that that is the sole duty of a jury. It is my duty to try to impress you with the law that should apply to the facts that you determine.

This indictment is based upon two counts; and may I say that it is the only indictment, that the testimony must apply solely to this indictment in order for you to find the defendant guilty, if you so believe him guilty under the evidence. He is charged with no other offense except these two particular charges. One count is that he transported things of value, in interstate commerce, from Newark, New Jersey, to the City of New York, of the value of $5000 or more. That is a simple charge and the charge that you are called upon to determine his guilt. The other count alleges that he, in connection with Rosenberg, possibly together with several other persons, one Cash and others, conspired and agreed together to violate the laws of the United States.

A conspiracy is an association between two or more persons to violate the law of the United States, either as a means or an end. It is not required of the Government that they prove the actual agreement if you believe there was [fol. 228] this understanding or undertaking between these two men, in connection with other persons, to violate the law of the United States; and that violation, of course, would be the transportation and sales of these travelers' checks. The Court has in your absence stricken from your

consideration the consideration of whether or not American Express money orders, as alleged in the indictment, of the value of $6400, have been transported. The Court of its own reason has stricken that from your consideration, but leaves entirely the determination of whether or not the alleged $5400 of travelers' checks had been transported by this defendant from New Jersey to the State of New York.

The defendant in this case has seen fit not to testify, and the Court says to you that he is not, under the laws of this country, required to testify, and you should not take into consideration, in determining your verdict, the fact that he did not so testify. It is no circumstance against him, because after all it is the duty of the Government, regardless of any action on the part of the defense, to prove the defendant guilty beyond a reasonable doubt and under these instructions, before you could so find him guilty.

[fol. 229] It is not the purpose of this Court to comment upon evidence or to suggest to you what weight certain evidence is entitled to, because the Court feels that is solely the duty of you jurors in the determination of the issues of fact.

But the Court might state to you that if you believe, beyond all reasonable doubt under the evidence in this case, that these certain travelers' checks were stolen in Atlantic City, New Jersey, transferred to Newark, New Jersey, and, while in the hands of Rosenberg, were transported by the defendant Petti to the City of New York, and that the value of said travelers' checks was $5000 or more and the defendant knew the same to have been stolen when he did so transport them, and you believe that beyond a reasonable doubt, then the defendant is guilty of the crime charged under the first count of the indictment.

If you further believe all these facts to be true and that the defendant conspired with Rosenberg and with other persons not named as defendants in the indictment, and agreed among themselves to do and perform certain illegal acts in violation of the laws of the United States and to violate the laws of the United States, then he would be guilty under count 2 of the indictment. And if you do not so believe beyond a reasonable doubt either of these sug-
[fol. 230] gestions as to either of these counts, it will be your duty to find the defendant not guilty under the charge of this indictment.

Remember in this case you are charged with trying this

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defendant for no other charge except the two counts of the indictment. Remember also that nothing should enter into your deliberation that has the tinge of prejudice or desire to inflict punishment without testimony, or a desire to acquit because of any particular sympathy that might arise in your minds in this particular lawsuit.

When you retire from this jury room you may undertake the deliberation of the guilt or innocence of this defendant on either of said counts or both of said counts, and when you have reached an agreement you will return the same into court.

Any suggestions on the part of the Government?

Mr. Klein: I have no further requests except——

The Court: Any suggestions on the part of the defendant?

Mr. Klein: Except I might add, the jury could, if they desire, take any of the exhibits they want.

The Court: I understand that.

Mr. Halle: The one reference to the No. 7 which I gave to your Honor.

The Court: There has been some misunderstanding. [fol. 231] I believe I don't care to give 7. I don't care to pick out any particular issues. I think I have stated it generally sufficiently to cover it.

Any further suggestions? Any exceptions?

(No response.)

The Court: An officer may be sworn to take charge of the jury. No. 13, our special juryman, may be excused. I see that none of the rest of you got hurt.

(A bailiff was sworn and the jury placed in his care.)

The Court: You may take them to lunch at whatever time you deem best, if necessary. You will take the jury to the jury room and then return for whatever exhibits they may want.

(The jury then retired for deliberation.)

The Court: The court stands recessed until two o'clock this afternoon.

(Recess to 2:00 p.m.)

[fol. 232] AFTERNOON SESSION

(At 2:30 p.m. the jury returned to the courtroom.)

FURTHER INSTRUCTIONS

The Court: Mr. Foreman, I received a request, I take it from you or the jury, asking to be further instructed in regard to certain matters of law concerning not only the original offense but the conspiracy. The Court may not have made himself clear.

It is not necessary, for defendant to be found guilty under the instruction given you this morning, that he know from whom the property was stolen or how it was stolen, but he must know at the time of the commission of the offense, from all the facts and circumstances you heard in the evidence, that it was stolen property, and if he knew that, not only the original offense but it applies equally well to the conspiracy charge.

I take it that I have made myself clear on that. Isn't that what I understand you requested me to instruct you on? Do I make myself clear?

The Foreman: Must he know the value of the stolen property?

The Court: No.

The Foreman: Nor the identity of it?

The Court: Oh, I should say he would have to know the [fol. 233] identity of it if he transported it. If he did transport it, and that is the charge, he would know the identity of it.

Mr. Halle: May I ask your Honor to further charge the jury that if he did not know that the property was stolen, then he could not be found guilty?

The Court: Oh yes, because, as a matter of fact, of course if he did not know, he is not so charged, but it is not necessary that he knew from whom it was stolen or how it was stolen. Now the jury may retire.

Juror No. 3: It is not quite clear to me; that is, that if the defendant did not know the nature of the transported articles but did know that something stolen was to be transported would he be guilty under the second count?

The Court: Under the second count he would not be guilty unless he knew that the article he was transporting—that he did at that time conspire for the purpose of transporting an article which he knew to have been stolen. That

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would be true. If he did not know what he was transporting, of course he could not be charged with this particular crime. Any exception, gentlemen, to that instruction?

(No response.)

The Court: All right, you may be excused.

[fol. 234] (The jury retired.)

(At 3.35 p. m. the jury returned to the courtroom.)

The Court: Mr. Foreman, have you reached a verdict in this case?

The Foreman: Yes, sir, we have.

The Court: Will you report your verdict to the clerk, if you will.

VERDICT

The Foreman: We the jury judge the defendant not guilty on the first count, and we judge the defendant guilty on the second count.

The Clerk: Lady and gentlemen of the jury, listen to your verdict as it stands recorded on the issues traversed between the United States of America and Albert Ralph Petti. You say you find the defendant guilty on count 2 and not guilty as to count 1, and so say you all?

The Foreman: That is correct.

The Court: Anything further with this jury, gentlemen?

(No response.)

The Court: You may then be excused according to the direction of the clerk.

The Clerk: I shall call your names, and answer to the roll, if you please.

(Roll called, all jurors present.)

[fol. 235] The Clerk: The jury is excused to report to Room 109.

The Court: Anything further in this matter at this time, gentlemen?

Mr. Halle: Your Honor, I would like to have a week, to put this matter off for a week for sentence and motions, because the nature of the verdict gives me some new work for research on the question of conspiracy acts, I take it.

The Court: All right.

I wonder if I could not agree with you gentlemen. I am leaving here a week from tomorrow, and I am wondering if—you see this is Thursday; would Wednesday be too short for you?

Mr. Halle: No, no, your Honor.

The Court: Is that agreeable with you?

Mr. Klein: Anything agreeable with your Honor is agreeable with the Government.

The Court: And is it your practice here to permit the defendant to go on his own bond?

Mr. Klein: I was about to say, your Honor, in view of the conviction by the jury I would ask your Honor to increase bail in this case.

The Court: What is the bail?

[fol. 236] Mr. Klein: $2500; and I would like to be heard, if I may, on that point.

The Court: I will listen to you, but unless there is some particular reason I don't feel like doing that.

Mr. Klein: Your Honor does remember some of the facts in connection with the previous crime for which the defendant was a fugitive from justice.

The Court: I think I remember all right.

Mr. Klein: For some sixteen months, at least a deserter from the Army, and he forfeited bail in the sum of $2500 in the District of New Jersey. At the time of apprehension in this case bail was set by the Commissioner in the sum of $7500, which bail was continued up during the time and until the defendant was released from the penitentiary, where he served a sentence in connection with the New Jersey case. In view of all the facts and circumstances, and in view of the fact that a bail forfeiture previously had been entered in the same sum in which bail now stands, and since there has been a conviction in this case, a felony conviction for which the maximum penalty is 10 years, I submit, your Honor, that the Government request an increase of bail of $5000.

[fol. 237] The Court: I feel, due to all the facts and circumstances in this case and the question of law involved in it, and the fact of the jury finding him guilty on the lesser of the two offenses, so far as that goes, I can't imagine a defendant silly enough to run on a bond of that sort. I think I will take the chance on my own responsibility——

Mr. Halle: And continue present bail, your Honor?

The Court: And continue the bail bond as it stands now.

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Mr. Klein: $2500, sentence next Wednesday morning, December 17th?

The Court: Yes. Any motions or sentence will be December 17th at 10.30; and you submit to counsel for Government any motion you desire a little prior to that time, in order not to delay it.

Mr. Halle: Yes.

(Adjourned to December 17, 1947, at 10:30 a. m. for sentence.)

[fol. 238] New York, December 17, 1947;
10.30 o'clock a. m.

The Clerk: United States against Petti.

Mr. Klein: Government is ready.

Mr. Halle: If the Court please, I want to make my motions first.

MOTION TO SET ASIDE VERDICT

I move that the jury's verdict in the second count be set aside on all the grounds, and for judgment of acquittal on all the grounds made at the end of the Government's case, and on all the grounds made at the entire case, on the ground that the Government has failed to prove a conspiracy as charged in the second count, and that the Government has failed to prove the commission of the offense charged, and that the evidence was insufficient to warrant the submission of the case to the jury.

In support of this motion, your Honor, I submitted a memorandum to you.

The Court: Yes, I have read it.

Mr. Halle: I will only take up a few minutes' time.

The Court: Go ahead.

[fol. 239] Mr. Halle: Of course we start off with certain fundamental propositions in a conspiracy case, that there must be two or more, and of course the courts have held time and again that where you do not name more than two but you say "and others unknown," that means other than two, and if you do name others, "plus others unknown," the evidence must show that there are others to that conspiracy. So in this case here you find Thompson, Cash and Jones charged as co-conspirators. Under the evidence in the case there is nothing to show that there was any conspiracy so far as they were concerned with transporting

these securities in interstate commerce, and that so far as any others unknown to the grand jurors, that can be eliminated entirely because there was no evidence on that.

So we start off with this proposition that the only two that could be charged with a conspiracy would be Rosenberg and Petti. Rosenberg's testimony was that his meeting with Petti was accidental in New York, and that he told him that he had some things, and then he said, "What things?" Mr. Klein questioned Rosenberg about some money orders, and he asked him if he could do anything with him. Well, Petti said, "I'll see what I can do," and the next we find Petti over in New Jersey, and the same conversation takes place. Petti is given these things. As [fol. 240] a matter of fact, Rosenberg was asked by Mr. Klein whether he had told or knew where these papers came from and he said no, that he did not tell Petti anything.

Now nothing was said about where they were to be taken to. Only one thing was the purpose there, for Petti to get rid of him, and later on when Rosenberg said to him, "Well, if you didn't get rid of them give them to me or bring them back to me."

Now that is not a conspiracy to transport stolen securities. As a matter of fact, the only thing that was mentioned by Rosenberg was money orders. Your Honor recalls the case simmered down to the travelers' checks and the money order was disregarded, so Rosenberg did not tell Petti, and Petti of course did not know that there were these travelers' checks. But nobody discussed the amount, which is another element.

Now this is a conspiracy under that particular section. It is not a general conspiracy. I have taken the burden which is cast upon me in moving to set aside the verdict by citing a number of cases. Your Honor has read the cases and I do not have to repeat them again.

I just glanced at Mr. Klein's brief which he handed me a few minutes before your Honor got on the bench. He [fol. 241] does not answer these cases. He puts in his memorandum such propositions that the man could be acquitted on one charge and convicted on the other; that conspiracy is a separate offense.

I agree with him on all that, but that does not answer our case.

I have taken the liberty—in the Crane case, which I

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cite on page 8 of my brief, I actually paraphrased word for word the facts as outlined in the Crane case, and they fit exactly to this case here. Where I say in the very last paragraph, and I quote from the Crane case exactly as it is in that case, except that I substitute the word "securities"—instead of "stolen money"—I use the phrase "stolen securities," and this is what it says:

> "No witness testified to knowledge of any agreement between them, express or implied, to transport or cause to be transported stolen securities of the value indicated in interstate commerce."

Now where is there a scintilla of evidence in this case that any part of this conspiracy had anything to do with taking the securities from one State to another?

As was said in this Crane case, which is the last case on [fol. 242] the subject—I think it is a Florida case—about stolen money, where the thieves had cheated by the old trick of the race track game Mr. and Mrs. Williams out of some considerable sum—$27,000. Now supposing they said "Yes, he did go out of the State. He could just as well have remained there. He could have left the money in the State. He could have left without taking the money, and whether he took the money or not does not make any difference. There was no agreement shown of a conspiracy."

After all, a conspiracy is an agreement, and an agreement must be to transfer this money in interstate commerce, or securities from one State to another. Now the agreement must be proven, and a conspiracy must be proven like any other charge. There is nothing magic about conspiracy. It does not simply mean all you have to do is throw in a lot of stuff and there is a conspiracy shown. I have shown about six cases here where the court says no conspiracy was shown, and under the circumstances I ask that my motion be granted.

(Mr. Klein replied on behalf of the Government.)

The Court: Well, gentlemen, as I have viewed this case from its day of trial to the present time, there were and are two serious questions involved. The questions are exceedingly new and novel—at least the Court is not ap- [fol. 243] prised of any former prior holdings—the ques-

tions are exceedingly new and novel, and that is the question of whether or not Exhibits 1 and 2 were properly introduced in evidence. Of course in the opinion of the Court they were properly introduced, if they were properly obtained. There has existed in my mind a serious question of the power of the officer making the search in the room because of the fact that they obtained entrance to the room peac-ably, and the Court has heretofore considered the question seriously and believed that there was a difference in a room obtained as a transient in a hotel, and in a domicile or the home of the defendant. The Court did therefore hold that these exhibits were proper.

There is another question that constantly popped up throughout the trial, and that was whether or not these travelers' checks had a value, if their value was the face value, and of course it amounted to more than $5000. I held that they did have a value, that there was nothing left to be done except that which could be done by holding that they were issued.

Now I do not want to rehearse all the facts, but I have always considered that those questions were serious questions for the Court to pass upon. I have exercised my opinion of the law in regard to them, and I have no reason [fol. 244] now to change it. That, therefore, brings us up to the question of whether or not there was evidence sufficient to be presented to the jury of a conspiracy. I feel that the evidence here was sufficient, that there was the testimony of the man, of the receiver, and there were the different telephone conversations that we cannot help but know transpired. There was the finding of this property in the room in New York; there was the knowledge of both the receiver and the defendant in this case that the property was in New Jersey, and that the home of the defendant was in New York, and that the transfer of them necessarily would transfer from one State to another.

I do not believe that the case cited by counsel, the Crane case, covers this particular set of facts at all. The motion will therefore be denied.

Mr. Halle: Exception.

Now will your Honor hear me on the question of sentence?

The Court: Yes, certainly. I would rather have the suggestion in the beginning of Government counsel.

Mr. Klein: I suggest to your Honor that we have the

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defendants Rosenberg and Petti to sentence, if your Honor [fol. 245] please, but I do not know which one your Honor wants to sentence first. I will be glad to go into the facts, if I may, as to both defendants.

The Court: That is perfectly all right.

(Mr. Klein made a statement on behalf of the Government re Rosenberg.)

Mr. Klein: In regard to Rosenberg, therefore, if your Honor please, since he is presently doing a ten to fourteen year sentence, and he has only done one year of that sentence, and there is very little likelihood that he will make parole in view of his past record, the Government respectfully recommends to your Honor that your Honor impose a two-year sentence in this case; that the execution of that sentence be suspended and that the defendant be placed on probation for one day, since probation would serve no useful purpose and since upon the execution of sentence being suspended, some sentence be imposed and the Government suggests a one-day probation.

With respect to the defendant Petti——

(Mr. Klein made a statement on behalf of the Government re Petti.)

Mr. Klein: In view of all the circumstances in the case, the Government has a recommendation to make to your Honor, if your Honor cares to hear it.

[fol. 246] The Court: Yes.

Mr. Klein: Your Honor, the Government respectfully recommends that Petti be sentenced to five years in the penitentiary, and that he also be fined the sum of $2500. In support of the fine, if your Honor please, I do not have to point out too greatly the course of time and the expense to the Government in the investigation which followed subsequent to Petti's arrest on November 1, 1945.

(Mr. Halle made a statement on behalf of the defendant to the Court.)

The Court: Haven't you a practice in this court that sentence may be imposed to run concurrently with the sentence imposed in New Jersey?

Mr. Klein: Yes, there is such.

The Court: I do not feel like putting this man on probation. I do feel that because of his age, and I do not

think he is of any material aid to the Government. I do not think he was of very much aid until he was almost compelled to do so, like most people. I haven't much sympathy for him, but you have reached that age in life where if you are required to serve the imposition of time, the imposition of sentence in New Jersey, you will have become quite an elderly man. Your life hasn't been very satisfactory, or very satisfactory to society.

[fol. 247] The sentence of the Court will be that you be placed in the custody of the Attorney General of the United States and be placed in some penal institution for a period of three years, and that such sentence shall run concurrently with the sentence now imposed upon you in the State of New Jersey.

As to the other defendant I have some sympathy for him because of his age, and I have some sympathy for him because I cannot help feel from this evidence that there was a sort of a connection between you and the other defendant who stands by you.

I think you two had an acquaintanceship and that perhaps that acquaintanceship was imposed somewhat on you by the other defendant. I have always given a man some credit for youth. You have been just as wrong as you could be for the few years you have spent—a deserter from the Army to me is one of the most serious things that any boy can contemplate, but it has happened, and I suppose it will continue to happen as you go through life. You deserted and you became a fugitive, as I see this case, and as a fugitive you were facing jail anyway and it did not make any difference what sort of people you met. That is the attitude that was running through your mind. I think you [fol. 248] are guilty in this case. From the evidence I cannot help but feel that you were attempting or that you could say that you might sell these securities. You could have had no other purpose anyway. I believe that you called the other defendant frequently, that your thought was to get rid of the property that you knew had been stolen. The jury at least found it so, but because of your age I am going to grant a little more leniency than the recommendation.

I do not think the recommendation is severe nor unusual nor improper, but just through sympathy of the Court I think I will reduce the years.

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SENTENCE

The sentence of the Court is you should be placed in the custody of the Attorney General to be placed in some institution, at his direction, for a period of three years and to be fined in the sum of $2500.

Mr. Halle: Your Honor, may we ask that he be released on bail in view of the serious questions involved in this case?

The Court: I will grant bail in this case. I might as well do it as have it done up above.

The bail now, as I understand you gentlemen, is $2500?

Mr. Klein: $2500.

Mr. Halle: May I say, your Honor, that this boy has not [fol. 249] got wealth; he has nothing. He is a working boy.

The Court: Well, it is up to the Court to put a substantial bond on in case of an appeal, and the bail may be set in the sum of $5000.

Mr. Halle: Will your Honor give us until—will you remand him in my custody until four o'clock to get bail?

The Court: No, I do not think I had better do that in this case.

Mr. Halle: I assure your Honor——

The Court: I know you do.

Mr. Halle: ——that he will be with me and we will either have bond or he will be surrendered by four o'clock.

The Court: It was called to my attention the other day that this man had at one time escaped a bond and I did not increase it then because I thought you had a chance to get it.

If the District Attorney has no objection I will do it, of course.

Mr. Klein: I have no objection.

The Court: All right, it may be done.

Mr. Halle: Thank you.

Mr. Klein: The practice in the District Court is to give [fol. 249a] the defendant until 4 p.m. If counsel assures me——

Mr. Halle: He will be with me all the time.

The Court: Then is your practice now that the bond now in effect would remain in effect until the new one was gotten?

Mr. Klein: Until four o'clock.

The Court: All right.

[fol. 250] In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal

Offenses:

Conspiracy to transport stolen securities of the value of over $5,000.00, in violation of Title 18, United States Code, Section 415 and Title 18, United States Code, Section 418a.

[fol. 251] Concise statement of Judgment or order, giving date and any Sentence:

Three years in the custody of the Attorney General and fined $2,500.00.

Name of Institution where now confined, if not on bail:

Defendant ordered released on bail in the sum of $5,000.00.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the above-stated judgment.

Dated: New York, December 17, 1947.

Albert R. Petti, Appellant.

[fol. 252] In United States Circuit Court of Appeals, Second District

[Title omitted]

Stipulation as to Record and Exhibits

The Appellant herein and his counsel have represented and hereby represent to the appellee:

1. That this transcript of the record contains all matter necessary fairly to present their points and such points as are relevant in reply.

2. That in so far as the transcript of record purports to contain the stenographic minutes of the proceedings, the

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minutes are set forth accurately, and omissions, if any, are clearly marked. Such omissions are only of matter wholly [fol. 253] immaterial to any question raised on this appeal.

3. That all exhibits are accurately reprinted, except those specified, namely:

Government's Ex. 1. Statement as to contents of safe.
" " 2. 21 Travelers' checks.
" " 3. 3 Money Orders.
" " 4. Bag in which checks were found.
" " 5. Notebook.
" " 6. Statement containing 2 pages.
" " 7. Photostatic copy of Hotel record.
" " 8. Telephone record sheet.
" " 9. Telephone record sheet.

which were omitted.

4. That the transcript of the record contains all matters required to be set forth by apaplicable rules.

In reliance upon these representations it is hereby stipulated and agreed by the undersigned that the foregoing is a true copy of the transcript of record of the District Court for the Southern District of New York in the above entitled matter as agreed on by the parties, and further, that all the exhibits pertaining to this cause not reproduced herein, may be submitted to the Court upon the argument of the appeal, with the same force and effect as if reproduced herein and, further, if it should appear to the appellee that matter properly a part of the transcript of record has been omitted and has become material, despite the representa- [fol. 254] tions herein made, the appellee may, at its option, reprint such matter as an appendix to its brief or may require the appellant to reprint such matter, and use such matter with the same force and effect as if reproduced herein.

John F. X. McGohey, United States Attorney for the Southern District of New York, Attorney for Plaintiff. Louis Halle, Attorney for Defendant, Albert Ralph Petti.

[fol. 255] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CLERK'S CERTIFICATE

I, William V. Connell, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is the transcript of the typewritten record of the said District Court in the above entitled matter as agreed on by the parties and that the last day to file service is 1st day of April, 1948.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 25th day of March, in the year of our Lord one thousand nine hundred and forty-eight and of the Independence of the said United States the one hundred and seventy-second.

William V. Connell, Clerk. (Seal.)

Last day to file record 4/1/48.

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[fol. 256] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 270—October Term, 1947

(Argued May 6, 1948. Decided May 25, 1948.)

Docket No. 20984

UNITED STATES OF AMERICA, Appellee,

v.

ALBERT RALPH PETTI, Appellant

Before L. Hand, Swan and Clark, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

The appellant was convicted of conspiracy to transport stolen securities in interstate commerce in violation of 18 U. S. C. A. §418(a). Judgment affirmed.

Halle & Halle, Attorneys for Appellant; Edward Halle, of Counsel. John F. X. McGohey, United States Attorney for Appellee; Bruno Schachner, Assistant United States Attorney, of Counsel.

OPINION

[fol. 257] SWAN, Circuit Judge:

The appellant was arrested in his hotel room in New York City on charges having no relation to the crime of which he was later convicted, namely, conspiracy to transport securities in violation of the National Stolen Property Act, 18 U. S. C. A. §418(a). After his arrest the arresting officers searched his room and found in a suit case traveler's checks of the face value of $5400, which had been stolen from the office of the American Express Company in Atlantic City, N. J. One of the thieves had left these traveler's checks with the appellant's co-conspirator, Rosenberg. The latter testified as a witness for the prosecution

that he delivered the traveler's checks to the appellant in New Jersey and the appellant promised to see what he could do to dispose of them. The jury acquitted the appellant on a count charging the substantive offense of transportation, but convicted him on a count charging conspiracy to transport. His appeal raises two interesting questions: the first involves the legality of the search by which the traveler's checks were discovered, and the second concerns whether the checks were "securities" of the value of at least $5,000.[1]

The facts concerning the search incident to the appellant's arrest are not in dispute. On October 31, 1945 four [fol. 258] agents of the Federal Bureau of Investigation were assigned to arrest the appellant on a charge or charges unrelated to the present indictment.[2] Having information that the appellant was registered in room 340 in the Hotel Taft in New York City, the agents proceeded to this hotel at 7:30 P.M. Two of the agents remained in the hotel lobby and two went to room 340 accompanied by an assistant manager of the hotel, who opened the door with a pass key, allowed the agents to enter, and locked the door behind them. A bench warrant had been issued for the appellant's arrest on one of the above mentioned unrelated charges but none of the four F.B.I. agents had a copy of the warrant and no search warrant had been issued. The two agents who entered room 340 remained there until the ap-

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[1] Section 418a of Title 18 makes criminal a conspiracy to violate any provision of sections 413-419 of Title 18.

Section 415 provides that "Whoever shall transport or cause to be transported in interstate * * * commerce any * * * securities * * * of the value of $5,000 or more theretofore stolen * * * knowing the same to have been so stolen * * * shall be punished by a fine * * * or by imprisonment * * * or both * * *."

Section 414(b) provides that "The term 'securities' shall include any note * * * traveler's check, * * * evidence of indebtedness * * * or, in general, any instrument commonly known as a 'security' * * * or any forged, counterfeited, or spurious representation of any of the foregoing."

[2] One charge was desertion from the army; the other violation of the Emergency Price Control Act of 1942, 50 U. S. C. A. App. §901, *et seq.*

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pellant returned to his room at 1:30 A. M. He was then arrested and a search of this room followed, which resulted in finding in the closet a suit case containing a paper bag in which were the traveler's checks. These were seized by the agents and were introduced in evidence at the trial as Exhibit 2 over the appellant's objection.

The lawfulness of the search and seizure turns first upon the legality of the arrest and second upon whether the ensuing search was fairly incidental to the arrest. The second point must be answered affirmatively on the authority of *Harris* v. *United States*, 331 U. S. 145, which sanctioned a search more extensive than the one here involved. Upon the first point the appellant relies on *Johnson* v. *United States*, 333 U. S. 10, which extended the protection of the Fourth Amendment to the defendant's "living quarters" in a hotel; but that case is distinguishable because there no warrant had been issued for the arrest of the defendant [fol. 259] when the officers gained access to her hotel room to arrest her. In the case at bar a warrant of arrest had been issued, and the Federal Rules of Criminal Procedure make it unnecessary for the arresting officer to have the warrant in his possession.[3] An officer with a warrant, after a summons to open, may even force his way in to make the arrest. Bishop, New Criminal Procedure, 1913 ed., §§195, 204, 205; *Commonwealth* v. *Reynolds*, 120 Mass. 190, 196; *State* v. *Shook*, 32 S. E. 2d. 329 333 (N. C.). Since under the rules a warrant may be executed by an officer not in possession of it, we think the agents had authority to gain access to the hotel room with the manager's consent, and to wait there for the appellant's return. See *United States* v. *Dean*, 50 F. 2d. 905 (D. C. Mass.). Thus the arrest was lawful and the search incidental thereto was likewise lawful.

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[3] Rule 4(c)(3) following 18 U. S. C. A. §687 as follows:

"(3) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. * * *"

The appellant contends that the traveler's checks in their incomplete form were not "securities" but were pieces of paper without value. The checks were signed by an officer of the Express Company but the spaces for the signature and counter-signature of a purchaser were unfilled and no payee's name was inserted after the words "Pay this cheque from our Balance to the Order of....." Except for delivery to a prospective purchaser, the check was complete so far as the Express Company was concerned. The authorities are not in accord as to the precise legal characteristics of traveler's checks before they have been completely filled out. See Negotiability of Travelers Checks, [fol. 260] 47 Yale L. J. 470. Where a thief signed and countersigned the stolen check and transferred it to a bona fide holder in due course, the latter was allowed to enforce it against the company in *American Express Co.* v. *Anadarko Bank & Trust Co.*, 179 Okla. 606, 67 P. 2d. 55. But the contrary was held in *City National Bank of Galveston* v. *American Express Co.*, 16 S. W. 2d. 278 (Tex. Com. App.). If the theft occurs after issuance to a purchaser, the traveler's check has been held a "security" for purposes of the National Stolen Property Act, although the purchaser had not affixed his countersignature. *Pines* v. *United States*, 123 F. 2d. 825, 828 (C. C. A. 8). The statute expressly includes any "traveler's check," and in our opinion this should be construed to cover such a check before as well as after its issuance to a purchaser. The purpose of the statute is to discourage the theft of evidences of indebtedness which may be made vehicles of fraud. A traveler's check is intended to be akin to currency as a circulating medium and to be accepted from anyone tendering it without further identification than the identity of the signature and countersignature. See *Peoples Savings Bank* v. *American Surety Co.*, 15 F. Supp. 911, 913 (W. D. Mich.). If both are blank, the thief can use the check to commit fraud even more easily than when forgery of the countersignature is required to make the document usable. In our opinion, therefore, the checks in question were "securities" within the meaning of the statute. And the value of the "securities" should be judged by their face amount, since the thief by signing and countersigning can use the securities to obtain such sum from a victim of his fraud.

It is urged that the verdict of guilt on the conspiracy count is unsupported by the evidence but the point is with-

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out merit. Rosenberg delivered the checks in New Jersey to the appellant, who was rooming in New York and said [fol. 261] he would see if he could dispose of them. The checks were in fact transported to New York, and the inference that the conspirators contemplated such transportation is plain.

Finally the appellant argues that acquittal on the substantive count precludes conviction on the conspiracy count either on the theory of *res judicata* or double jeopardy. He relies on *Sealfon* v. *United States*, 332 U. S. 575. But that case lends no support to his argument. There the defendant's acquittal on a charge of conspiracy was a valid defense to a later prosecution for a different offense. The doctrine has no application to different counts in the same indictment or to consolidated indictments.

Judgment affirmed.

[fol. 262] In United States Circuit Court of Appeals
Second Circuit

United States, Plaintiff-Appellee,

v.

Albert Ralph Petti, Defendant-Appellant.

Judgment—Filed May 25, 1948

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree,

Alexander M. Bell, Clerk.

[fol. 263] (File endorsement omitted)

[fol. 264] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 265] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 118

ALBERT RALPH PETTI, Petitioner,

vs.

THE UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI.—Filed October 11, 1948.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 266] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed Dec. 6, 1948

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the following portions of the typewritten record of the testimony in the above entitled matter, on file in this court, need not be reproduced in the printed Transcript of Record in this court:

Page 2—"The Court: Now we * * * the defendant.)"
Further on page 2—"Q. And what * * * the Agency."
Page 3—in toto.
Page 4—"occasion * * * locked it."
Further on page 4—"Q. Did you thereafter * * * in Atlantic."
Pages 5 to 10 inclusive—in toto.
Page 11—"Q. I know you * * * in evidence)."
Page 12—"Preliminary * * * for these."
Page 13—in toto.
Page 14—"in this respect * * * have they?"
Page 15—"Q. Are you able * * * if the."
[fol. 267] Page 16—"Court please * * * the exhibit."
Further on page 16—By Mr. Klein * * * $6850.

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Page 17—in toto.
Page 22—"Q. Well, did you • • • Sustained."
Page 23—"Q. Did anything • • • anything unusual."
Page 24—"happen on • • • somebody else."
Further on page 24—"Q. Now • • • Mt. Pleasant Ave."
Page 25—"The Court: Well, she • • • told her."
Page 26—"Q. Well • • • in it. Mr. Klein: All right."
Page 27—"Mr. Klein: No further • • • next witness."
Further on page 27—"Q. Mr. Cash • • • few of them."
Page 31—"It wasn't long • • • objection sustained."
Page 32—"Q. Now, you • • • you see."
Pages 33 to 35 inclusive—in toto.
Page 36—"United States • • • Exhibits handed to the jury)."
Further on page 36—"Q. Mr. Rosenberg • • • Receiving? A. Yes, sir."
Page 37—"Q. Stolen Goods? • • • prison sentence? A. Yes, sir."
Page 38—"Q. Did you plead guilty to that? • • • of a juror."
Page 39—"Mr. Klein: Trying to • • • A. No, sir."
Page 42—"Q. Did he leave • • • let him state."
Further on page 42—"Q. Was there • • • I will • • •"
Page 43—"Mr. Halle: And he • • • all right."
[fol. 268] Page 47—"I don't • • • The Court: Yes."
Page 48—"Mr. Klein • • • question."
Further on page 48—"Q. Did you learn whether • • • of times."
Page 49—"Q. Was that • • • not responsive."
Page 50—"Mr. Halle: I object • • • the books?"
Pages 51 to 72 inclusive—in toto.
Page 73—"Q. I show you • • • next witness."
Pages 74 to 77 inclusive—in toto.
Page 78—"Q. Well, what is • • • for American Express Company."
Page 80—"Q. Now, you • • • on your own."
Page 81—"knowledge • • • That is all."
Further on page 81—"Q. These travelers • • • I object."
Page 82—"The Court • • • them or not."

Further on page 82—"Q. Are there * * * next witness."

Page 86—"Q. I show * * * in evidence."

Page 87—"Do you * * * withdraw the question."

Page 97—"Mr. Klein: May I * * * give me."

Page 98—in toto.

Page 105—"Q. That is * * * it might indicate."

Page 107—"Q. And was * * * was actually"

Pages 108 to 123 inclusive—in toto.

Page 125—"Witness excused * * * next witness."

Page 130—"Q. What happened * * * may be stricken."

Pages 134 to 150 inclusive—in toto.

Page 155—"(witness excused) * * * next witness."

Page 158—"Mr. Halle: That is all * * * a furrier."

[fol. 269] Pages 159 to 177 inclusive—in toto.

Page 178—"proceed with * * * next witness."

Page 192—"Mr. Klein: No further * * * step up"

Pages 193 to 212 inclusive—in toto.

Page 213—"being tried * * * be excused."

Page 222—in toto.

Page 223—"United States—Trial resumed."

It Is Further Stipulated and Agreed, that either of the [parties may refer to such of the] above mentioned portions of the typewritten record which are not being printed in their briefs and upon oral argument, if it should become necessary.

It Is Further Stipulated and Agreed, that Government's Exhibits 1 through 9 inclusive, need not be reproduced in the printed record, but that any of the mentioned exhibits may be submitted to the court upon the argument of the appeal with the same force and effect as if reproduced therein.

It Is Further Stipulated and Agreed, that the facsimile of the travelers checks comprising Government's Exhibit 2, which has been certified to this court by the Clerk of the Court of Appeals for the Second Circuit, as having been used upon the argument below, may be handed up to this Court upon the argument of the appeal herein as Govern-

[fol. 270] ment's Exhibit 2, in lieu of the original Govern-

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ment's Exhibit 2 for use upon the argument of the instant appeal.

Dated—December 2nd, 1948.

Edward Halle, Attorneys for Petitioner. Philip B. Perlman, Solicitor General of the United States, Attorney for Respondent.

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CLERK

Supreme Court of the United States

October Term, 1947.

No. 118

ALBERT RALPH PETTI,
Petitioner,

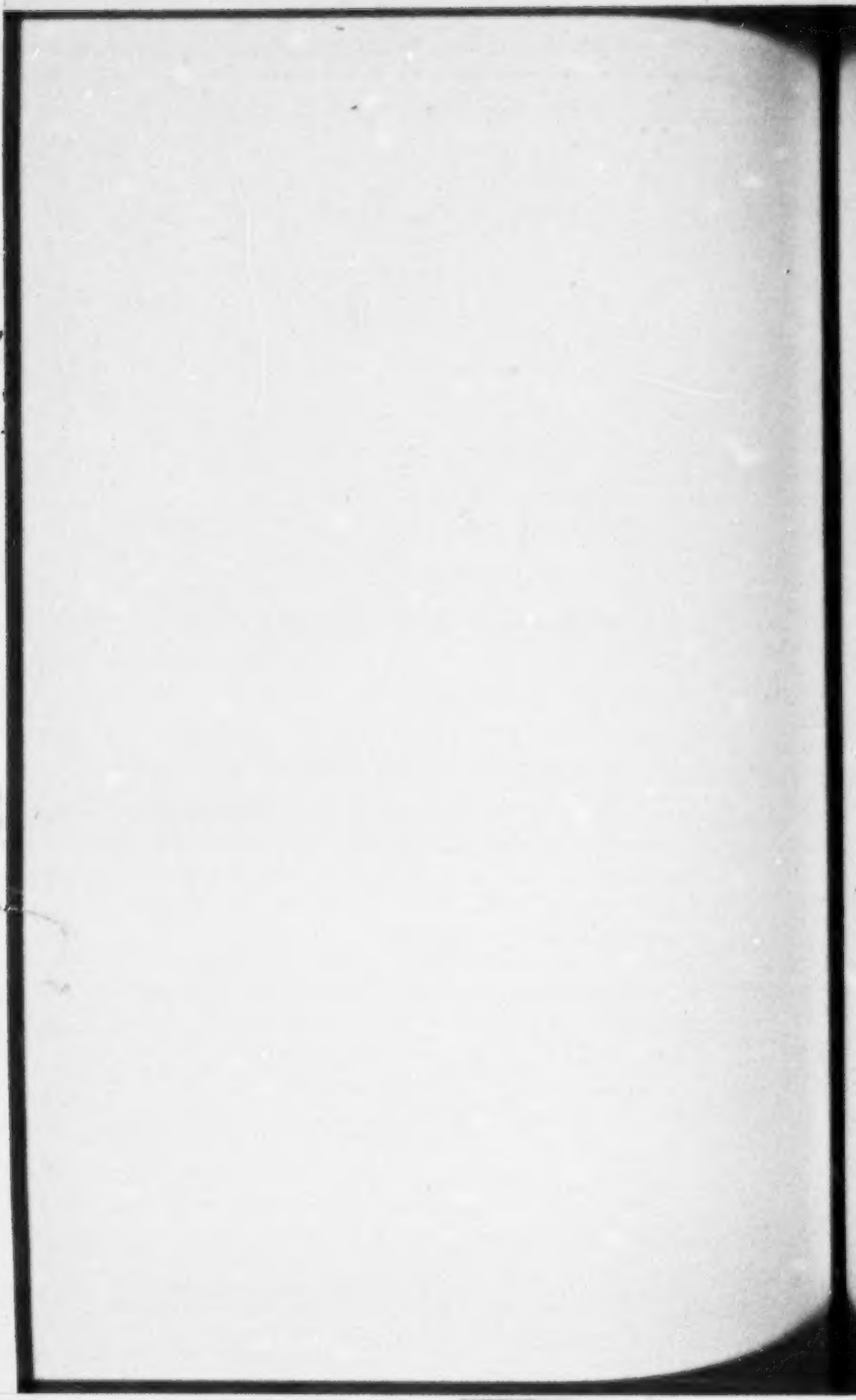
vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, Brief in Support Thereof, and Appendix Containing Motion to Dispense With Printing of Record for Use on Certiorari Proceedings.

EDWARD HALLE,
Attorney for Petitioner.

LOWER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689



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Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

ALBERT RALPH PETTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Albert Ralph Petti, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, in an opinion (annexed to the Record herein) per Swan, *C. J.*, filed on May 25, 1948, affirming a judgment of conviction of the District Court for the Southern District of New York convicting petitioner of conspiracy to transport stolen securities in interstate commerce in violation of 18 U. S. C., §418(a). Petitioner was sentenced to three years imprisonment and fined $2,500. Following conviction the petitioner was continued on bail pending disposition of his appeal.

On June 3, 1948 the United States Circuit Court of Appeals for the Second Circuit denied application to stay the

issuance of its mandate pending the filing of this petition for writ of certiorari. Application was made to Justice Jackson of this court, and a temporary stay of the Circuit Court's mandate was granted on the 8th day of June to and including June 14, 1948.

On June 14, 1948 an order of this court was signed by Mr. Justice Jackson to stay the mandate of the United States Circuit Court, providing that petition for certiorari is filed within the statutory period provided by law, and further that if a petition for certiorari is duly filed the stay to continue pending the ultimate decision of this court.

Petitioner is now at liberty on bail.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925.

A.

Statement of the Case.

The indictment contained two counts. Count I charged that the petitioner and one, Charles Solomon Rosenberg, unlawfully transported and caused to be transported in interstate commerce, securities of the value of over $5,000 which had theretofore been stolen, knowing the securities to have been stolen. The particular securities enumerated in Count 1 of the indictment were 185 American Express Travelers checks of the value of $5,400 and 128 American Express Money Orders of the value of $6,850. It is alleged that these instruments were caused to be transported from the City of Newark, New Jersey to the City of New York and were previously stolen from the American Express

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Company in Atlantic City, New Jersey. The count is laid under Title 18, United States Code, §415.

Count 2 of the indictment charged the petitioner and Rosenberg and other persons with conspiracy to violate Title 18, Section 415 of the United States Code, in that they conspired to transport securities of the value of over $5,000 from Newark, New Jersey, to New York, New York, in violation of §418(a), Title 18, U. S. Code. The jury returned a verdict of Not Guilty as to Count 1 and Guilty as to Count 2 of the indictment.

Thus, while petitioner was acquitted of the substantive offense of transporting, he was convicted of conspiracy to transport, although the proof for the conspiracy was identical with the proof for the substantive charge, as will be brought out hereinbelow.

B.

Facts.

(1) Concerning Search and Seizure.

On October 31, 1945, four officers of the Federal Bureau of Investigation were assigned to arrest the petitioner (R. 83, 84, 126, 127, 179, 187), on a charge or charges, wholly unrelated to the charges in the indictment under which petitioner was convicted and sentenced herein (R. 96, 100). Having had the information that petitioner was registered at the Hotel Taft in room 340 (R. 127, 187), they proceeded to the hotel and arrived that evening at 7:30 P. M. (R. 83, 84, 126, 179). One of the agents called Room 340 on the hotel house phone but received no answer (R. 127); thereupon two of the agents were stationed in the hotel lobby (R. 84, 179), and the other two ascended to Room 340 accompanied by an assistant manager (R. 84, 91,

127), with whom arrangements had been made to gain access to the room (R. 94). The hotel man rapped on the door and, receiving no response, opened it with a passkey (R. 128).

The two agents entered the room. The manager stayed outside of the room, locking the door behind them (R. 128). The investigators then made a search of the room, closet and bathroom, after which they were satisfied that the petitioner was not present (R. 128).

While there was testimony by one of the agents that a bench warrant had been issued for petitioner's arrest on the above mentioned unrelated charges, none of the agents had a copy of such warrant with him when entering petitioner's room or during his arrest which occurred some six hours later (R. 96, 101). There was no search warrant to search Room 340 of the Hotel Taft (R. 96).

While the propriety of the officer's entry into the room in the first instance may well be questioned, it is certain that having ascertained petitioner's absence, their continued presence in the room was highly improper and a substantial violation of the petitioner's constitutional rights, in view of the lack of a search warrant.

Petitioner returned to his room at 1:30 A. M. the following morning, letting himself in with his key (R. 129). He was arrested and searched personally by the two agents who had remained in his room continuously from 7:30 P. M. the evening before (R. 95, 128, 129, 181). The two agents who had remained in the lobby during this time were then summoned and reported to Room 340 (R. 181). A search of the room was then repeated during which the agents found a suitcase in the closet, which contained a paper bag, in which blanks for Travelers checks and American Express Money Orders were found (R. 85, 86, 87, 130, 132, 133, 182, 183).

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(2) CONCERNING THE ALLEGED CONSPIRACY.

It was not until November 2, 1945 that the agents learned of the source of these papers (R. 140) and on that date a warrant for petitioner was issued (R. 136).

Thus, after the papers were found in petitioner's possession in the manner described above, the government adduced the following information: On October 26, 1945, a quantity of blank American Express Travelers checks and money orders were stolen from the Atlantic City, N. J. office of the American Express Company (R. 27-29). On October 27th, an individual by the name of Cash, who was involved in the larceny, brought these papers to petitioner's alleged co-conspirator, Charles Solomon Rosenberg, at his house in Newark, N. J. (R. 40). Rosenberg did not want them; however, at Cash's insistence, he kept the papers and loaned Cash about $30 or $40 to pay his rent (R. 30, 31, 41, 42). Cash did not tell Rosenberg where he got the papers (R. 43).

Rosenberg testified that he went to the Roxy Theatre in New York the next day (October 28, 1945) with Eleanor Strom, and met the petitioner, *quite by accident*, at Fiftieth Street and Broadway (R. 44, 52). He testified further that he told petitioner about the papers in evidence and inquired as to whether petitioner could do anything with them and that petitioner said he would see and was told to come over to Newark to get the papers (R. 45). Eleanor Strom was not a witness to their alleged conversation (R. 45). Later that evening petitioner met Rosenberg in Newark and he testified that petitioner took the papers and said, "I will see what I can do with them" (R. 217). This conversation lasted only a few minutes and the two of them were alone (R. 48). Rosenberg testified that he saw petitioner a few times after and told him that if he did not get rid of the papers to return them and he

says petitioner told him he could not get rid of the papers (R. 419). These alleged visits were at Rosenberg's house at 133 Mt. Pleasant Avenue, Newark, N. J. (R. 40, 49).

There was also evidence that petitioner had made telephone calls to Rosenberg but the only evidence as to the content of any of the calls was Rosenberg's testimony that on the 28th, petitioner called him and said he would be over (R. 48).

At 1:30 A. M., November 1st, petitioner was arrested as aforesaid at the Hotel Taft, New York, N. Y., with the papers in his possession.

It was on the above mentioned evidence that the jury acquitted petitioner of the substantive charge of transporting but convicted him of conspiring to transport stolen "securities" of a value of more than $5,000 from Newark, N. J. to New York.

(3) Concerning the Alleged "Securities" Described in the Counts of the Indictment.

Government's Exhibit 2, consists of several papers in the usual form of travelers checks issued by the American Express Company. They are incomplete in that the spaces for the required signature and counter-signature of the purchaser are blank.

The purchaser must sign the check in the presence of an employee of the company before it is issued (R. 79, 80). As a matter of fact, even after its issue, the paper does not become a check until it is countersigned with the signature of the purchaser in the presence of the person cashing it. This information is contained on the face of the paper itself (Govt. Exh. 2, upper left and lower left corners).

Government's Exhibit 3 consists of papers in the usual form of money orders issued by the American Express

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Company. These papers are also incomplete in that they lack the signature of the company issuing officer or agent (R. 79).

The face of each of the papers described in both Exhibits 2 and 3 includes a denomination of amount in dollars which presumably is the value of the paper after it is issued for value and properly endorsed. The total of such denominations of the alleged travelers checks is $5,400 and of the alleged money orders is $6,850.

After the Government rested, petitioner's counsel moved to dismiss the indictment for lack of proof (R. 214). The trial court ruled that the money orders had no value and struck reference to them from the indictment (R. 221). However, the question of value of the alleged travelers checks (Govt. Exh. 2) went to the jury (R. 221, 228).

C.

The Questions Presented.

The following questions arise as a result of the action of the trial court as affirmed by the Circuit Court of Appeals:

1. Is a search made properly incident to an arrest where federal officers entered the petitioner's abode in his absence and without his permission and waited in the said premises as trespassers for six hours until he arrived, whereupon they arrested him and discovered the evidence herein, consisting of the alleged travelers checks?

2. Are blank travelers checks which are stolen before issuance to a purchaser, being incomplete in not having thereon the proper signatures necessary for negotiation, securities within the meaning of Title 18 U. S. C., Section 415?

3. Can petitioner be convicted of conspiracy to violate the National Stolen Property Act under the provisions of Title 18, U. S. C., 415(a), where there is no proof in evidence that petitioner conspired specifically to cause anything to be transported over state lines?

4. Since the proof as to the substantive charge contained in count 1 and the conspiracy charge contained in count 2 was identical, was the petitioner's acquittal on count 1 *res judicata* with relation to the charge in count 2 upon which the petitioner was found guilty, in view of this court's recent decision in *Sealfon* v. *United States*, 332 U. S. 575, when read in conjunction with *Dunn* v. *United States*, 284 U. S. 390, 393.

D.

Reasons Relied on for Allowance of the Writ.

In the decision sought to be reviewed, the Circuit Court of Appeals has decided important questions of federal criminal law which have not been but which should be settled by this court; has decided federal questions in a way probably in conflict with applicable decisions of this Honorable Court, and has misconstrued the provisions of Title 18, U. S. C., Section 415, as will be brought out more particularly in the attached brief in Point II. The decision sought to be reviewed invades constitutional rights of petitioner and in effect sanctions his conviction for a crime which, if it be a crime at all, is not a federal but merely a state offense. Finally, it will permit federal courts who follow it to disregard the rule as laid down by this court in *Sealfon* v. *United States, supra*, wherein it was held that acquittal of a substantive defense is *res adjudicata* precluding conviction for conspiracy based upon the same proof.

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Apart from such widespread effect on the administration of criminal justice in the federal courts, the decision sought to be reviewed, if permitted to stand uncorrected, will result in a denial to the petitioner of his fundamental constitutional rights according to the rules laid down heretofore by this Honorable Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem just and proper.

Dated—June 23, 1948.

ALBERT RALPH PETTI,
Petitioner.

/s/ EDWARD HALLE,
By EDWARD HALLE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Argument.

I.

The alleged travelers checks, Government's Exhibit 2, were obtained as result of illegal search and seizure and should have been suppressed. Failure on the part of the trial court to do so and affirmance by the Circuit Court of Appeals constitutes reversible error.

Before the officers gained entrance to petitioner's room they knew he was not in it. Upon entering they were convinced he was not there. Yet they waited in his room as mere trespassers until his return, *six hours later*, at which time they arrested him and found Government's Exhibit 2, the alleged travelers checks, in his closet.

It is submitted that they had no right to enter the room without a search warrant and that the search was unreasonable and illegal. In answer, the contention will probably be made that the search was incident to a legal arrest. This contention is untenable. Assuming, *arguendo*, that the officers had every right to search petitioner's room for the purpose of arresting him, as soon as they discovered that he was not there, it was certain that no arrest could be made within the room. Their right to remain in the room, if such initial right existed concerning the search for petitoner's person for the purpose of arrest, dissipated.

The agents should have left it immediately upon finding the room vacant. It would have been proper for them to wait in the corridor, if they wished, and to arrest him on his return to the hotel. If they did so, however, they would have had no right to search petitioner's room as an incident to such arrest (*Agnello* v. *United States*, 269 U. S. 20, 32).

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If the officers could not properly search the room after arresting petitioner outside of it, they certainly could not wait in the room to which they obtained entry without the knowledge or consent of petitioner and make their search incident to arrest, merely because they chose to set the place of arrest in that particular room improperly, and without right.

The Trial Justice recognized the validity of this reasoning but did not apply it in this case because the place of petitioner's abode was a hotel room, and he did not feel that a hotel room came within the provisions of the Fourth Amendment (R. 216-221). It is submitted that the court committed reversible error in ruling that a hotel room was not the same as a "private mansion" (R. 219).

Since the ruling in the instant case, the question has been resolved in a recent decision by this court, wherein the defendant challenged the search of a hotel room as an incident of her arrest. The opinion in the case conclusively shows that the protection of the Fourth Amendment extends to hotel rooms (*Johnson* v. *United States*, 333 U. S. 10).

The Circuit Court of Appeals distinguished this court's ruling in the *Johnson* case, *supra*, on the ground that no warrant had been issued for the arrest of the defendant in that case when the officers gained access to her hotel room to arrest her, stating that in the instant case, since a bench warrant had been issued for the petitioner, the officer had a right to enter his room. What the Circuit Court of Appeals overlooks is that in the *Johnson* case the defendant was in her room when the officers entered, whereas in this case the room was vacant when the officers entered and remained vacant for a period of six hours until the petitioner returned. It is submitted that whether the officers were acting under the authority of an arrest warrant or not they had no right to remain in the room for six hours. The warrant may have entitled them to force their way

into the room for the purpose of arresting the petitioner, but once having done so and finding the petitioner absent, the reason for their original entry ceased to exist.

This case is no different from one where officers enter a private mansion under the authority of an arrest warrant, make their search for the body of the defendant and fail to find it. They have no license to remain in the house after they are convinced that he is not there, since the authority contained under and by virtue of the arrest or bench warrant ceases to exist when the object of the arrest is not present on the premises.

It is incontrovertible that whether the officers did or did not have an arrest warrant they could not arrest anybody who wasn't there and, consequently, they had no business to stay on the premises for the next six hours. It is submitted that the federal agents waited in the petitioner's room for that length of time merely for the purpose of being able to make what they considered a search properly incident to an arrest. A search made under the circumstances is not a search made incident to a legal arrest. It violates the mandate of the Fourth Amendment. The trial court recognized that such a search was not incident to arrest but refused to suppress the evidence because it considered that a hotel room was not within the purview of the Fourth Amendment. The Circuit Court of Appeals, while agreeing that the question of hotel room did not remove the search from the Fourth Amendment, held that the search was incident to a legal arrest and therefore valid.

It is respectfully submitted that both courts were in error since (1) a hotel room is no different from a private home and comes within the prohibition against illegal searches and seizures contained in the Fourth Amendment, and (2) federal officers may not circumvent the constitutional safeguards contained in the Fourth Amendment, even though they are acting under an arrest warrant,

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where they remain on the petitioner's premises for more than six hours after they discover that he was not there.

The officers testified that the papers in evidence were not discovered until after petitioner's arrest, and the Circuit Court based the legality of the search upon legal incidence to the said arrest. However, it is submitted that the officers did search the room when they originally entered; therefore, whatever was found in petitioner's room, even if chronologically subsequent to his arrest, was tainted by the unauthorized presence of the officers for a period of six hours before his return. If he had not returned, the instant search would clearly have been an unreasonable one. It was the unauthorized and illegal trespass of the officers that brought the fruits of the exploratory search to light. A continuing search under such circumstances is both unreasonable and illegal (*Taylor* v. *United States*, 286 U. S. 1, 5, 6).

II.

Failure to dismiss the indictment was reversible error since the blank forms, which when properly filled out would be American Express Travelers Checks, were of no value, and were not securities.

In order to prove the charge in count 2 of the indictment alleging conspiracy to transport knowingly stolen securities of a value of over $5,000, it was necessary for the Government to establish that the papers in evidence were securities of a value of over $5,000. At the outset it is submitted that the papers contained in Exhibit 2 were not securities. On the face of each blank, in the upper left-hand corner, appears the following definition of the paper itself:

> "U. S. Dollar Travelers Cheque
> When Countersigned Below With
> This Signature
> ....."

Directly below in the lower left-hand corner there appears:

> "Countersign Here in Presence of Person Cashing
> ....."

Thus, by definition on the paper itself, it does not become a check or "security" until both signatures are properly and duly placed thereon. In the present blank form it was never intended nor could it be said to be a security.

These incomplete papers were stolen before they had been issued. There are innumerable rulings that an instrument stolen before completion and issuance has no standing as a negotiable instrument and has no value (*Ledwich* v. *McKim*, 53 N. Y. 307, 313; *Davis Sewing Machine Co.* v. *Best*, 105 N. Y. 59, 67, 68; *Holzman, Cohen & Co.* v. *Teague*, 172 App. Div. 75, 158 N. Y. S. 211; *Nicholaras* v. *Stewart*, 25 N. Y. S. [2d] 157).

The conspiracy count defines these incomplete papers as "securities" of a value of over $5,000. There is no charge contained in the conspiracy count that they had been forged or that there was any intent on the part of petitioner or anyone else to forge them. If the government intended to rely on a forgery the definition of the conspiracy could have been based on that portion of the statute which relates to transportation of forged instruments, which contains no requirement of value of over $5,000. The pertinent part of the substantive statute (Sec. 415, Title 18, U. S. C.) concerning forgeries is:

> "* * * or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, * * *."

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However, the indictment did not charge an offense readable on this forgery section of the statute. The instant charge of conspiracy involves a crime defined by that portion of the substantive statute which reads as follows:

> "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken * * *."

There can be no implication of a future forgery with relation to the instruments set forth in this indictment. The Government cannot indulge in if's, and's or but's. What anyone would do with these papers, or could do to them, with intent to defraud is of no moment. The petitioner is not on trial for forging securities, much less thinking about doing so. He was convicted of conspiring to transport *securities*. The evidence submitted in proof of this charge must by a clear, cool appraisal actually reveal securities of a value of over $5,000, in the physical form in which they existed at the time of the alleged conspiracy. It is not a federal offense to forge securities. It is only an offense to transport forged securities over state lines.

The blank forms in evidence are not securities and have no value other than the paper and ink of which they are comprised. The papers in evidence are neither fish nor fowl; they are neither securities nor forgeries and so do not come under any of the penal provisions of Title 18, U. S. C., Section 415 or 418(a).

Nevertheless, the Circuit Court of Appeals, after stating that the authorities were not in accord as to precise legal characteristics of travelers checks before they have

been completely filled out, decided that these checks came within the definition of securities as contained in Title 18, Section 415, and that they were of a value equivalent to the face value printed on each paper. The rationale of this decision is that if the theft of the checks had occurred *after* issuance to a purchaser they would be a security for the purposes of the National Stolen Property Act (*Pines* v. *United States*, 123 Fed. [2d] 825, 828, C. C. A.). What the court overlooked was that the *Pines* case involved an indictment under that portion of Title 18, Section 415 quoted hereinabove involving the fraudulent transportation of falsely made or counterfeited securities. It did not involve the transportation in interstate commerce of securities of the value of over $5,000 known to have been stolen, as was charged herein. The case is entirely distinguishable in that not only was the charge different but the proof of such charge was different.

In the instant case, petitioner was charged with transporting stolen securities in interstate commerce of a value of over $5,000, knowing the same to have been stolen, and also with conspiracy to commit the substantive offense. It was, therefore, necessary to prove (1) that securities were stolen; (2) that petitioner conspired to transport same in interstate commerce knowing them to have been stolen, and (3) that they were securities of a value of more than $5,000.

In the *Pines* case, the charge was transporting forged, altered and counterfeited securities unlawfully and with intent to defraud, to wit, a travelers check purportedly issued by the Gotham Trust Company of New York, a fictitious bank, in the denomination of $100, knowing the same to have been falsely made, forged and altered. The Government's proof in such a case consists of showing the false character of the alleged security and proving the fraudulent intent. It would not be necessary to prove value of over $5,000, or that the instrument was theretofore stolen, within the knowledge of the defendant.

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It may readily be seen that the charges involved in the two cases are totally different and that the decision in the *Pines* case is not authority for the fact that blank travelers checks stolen before issuance have value. The *Pines* case merely stated that since the purported travelers check involved was allegedly countersigned by a purchaser, and since a valid travelers check is complete as against a bank "when issued", the spurious paper constituted a false security within the purview of the Act because falsely made to simulate a valid travelers check. This holding merely affirms the language of the statute which says that it is a crime to transport a forged security across the state line for a fraudulent purpose. It is not authority that an incomplete, unissued security which is stolen before issuance has value or is a valid security.

The Circuit Court of Appeals, in addition to following the *Pines* case as aforesaid, went even further in order to place the facts of this case into the frame of the *Pines* case. The court stated at page 1485 of the opinion, in referring to the wholly unexecuted blanks on the check form:

> "The thief can use the check to commit fraud even more easily than when forgery of the countersignature is required to make the document usable."

Therefore, in this case the Circuit Court said—here we have blank papers purporting to be travelers checks; they were never issued; however, since the thief could forge them to look like issued securities they have value. It should be noted, however, that when these alleged checks were found they were not forged; they were still in blank form. Most important there was no charge of forgery in the indictment herein.

It is, therefore, submitted that the Court of Appeals committed error in coming to its decision as aforesaid, and that such error creates a precedent which will in effect

vitiate the requirement of value of $5,000 to give federal courts jurisdiction under the National Stolen Property Act, which is certainly contrary to the intent which Congress had when the Act was passed. It was not congressional intent, nor could it constitutionally be, to punish anticipated, *in futuro*, forgery under the provisions of the National Stolen Property Act.

III.

The verdict of guilty on the conspiracy count, being unsupported by proof, should have been set aside. Failure to do so constituted reversible error.

Count 2 of the indictment charges a conspiracy between the petitioner and Rosenberg and other persons named and unknown, to violate Title 18, U. S. C., Section 415, in that it was part of the said conspiracy that they would transport and cause to be transported, securities of the value of over $5,000, knowing same to have been stolen, from Newark, New Jersey to New York, New York. This count is laid under Title 18, U. S. C., Section 418a, which provides that if two or more persons enter into an agreement or conspiracy to violate any provision of Sections 413 through 419, of said Title and do any overt act in furtherance thereof, such persons shall be punishable as provided in said Sections 413-419.

The conspiracy count as thus laid is distinguishable from a conspiracy count laid under the provisions of Title 18, Section 88. The former is not a general conspiracy statute but applies solely to the provisions of the National Stolen Property Act. The latter is general in its scope providing that conspiracy to commit *any* offense against the United States combined with an overt act shall be a crime. It is to be noted that the special conspiracy statute provided for in Section 418a of the Code provides a maximum punishment of ten years imprisonment (*cf.* Section

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415) whereas the general conspiracy statute as contained in Section 88 provides a maximum term of imprisonment of only two years. It, therefore, follows that Congress, in enacting the special conspiracy statute entailing a maximum punishment by imprisonment of five times greater than that of the general statute, most certainly intended to define this punishment for a specific conspiracy which involved transportation over state lines as a part of the express agreement of the parties.

The weight of available authority confirms this view, since the cases which discuss the special conspiracy statute under the National Stolen Property Act, and other such special acts, all point to the fact that proof of an express agreement to cross state lines must be adduced in order to convict. This will be pointed out in the discussion of these cases below.

Assuming, *arguendo*, that there was in fact a conspiracy herein, the evidence definitely disclosed that such conspiracy was only between the two conspirators named in the indictment as defendants, namely, the petitioner and Rosenberg. The record discloses that the only other person who dealt with the alleged securities other than the petitioner and Rosenberg was the thief, Cash, who brought said alleged securities to Rosenberg. There is no evidence to show that Cash was a part of any conspiracy. All he did was to dispose of the fruits of his crime by selling them to Rosenberg. What Rosenberg did with them thereafter was no concern of his (*United States* v. *Zeuli*, 137 F. [2d] 845; *United States* v. *DiRe*, 159 F. [2d] 818, affirmed 92 L. Ed. 219, adv. op. No. 6).

The alleged conspiracy therefore resolved specifically to an agreement between the petitioner and Rosenberg. If the evidence adduced at the trial supports and proves such an agreement in violation of count 2 of the indictment then no error was committed herein. However, it is submitted that the evidence falls far short of proving the charge.

Briefly, if Rosenberg's testimony is to be believed in its entirety, the following occurred: Rosenberg met petitioner *by accident* on 50th Street and Broadway, in the evening of October 28, 1946. A short conference ensued during which Rosenberg stated that he had some money orders and petitioner agreed to see what he could do about it. A telephone call was made from the Hotel Taft to a Humbolt exchange in Newark at 7:17 P. M., that same evening, which presumably was a conversation between petitioner and Rosenberg. Rosenberg testified that the substance of this conversation was that petitioner said he would come over. Although there is evidence that other telephone calls were made, there is nothing in the record to show what the content of conversation was in such calls. It must be presumed since the call was made to Rosenberg and since Rosenberg was a witness at the trial that if there was anything in those telephone calls which would further prove the charges alleged, it would have been brought out. Failure to do so is conclusive that the telephone calls had no relation to the charges in the indictment. Rosenberg further testified that at a later occasion or occasions he met the petitioner again at his home in Newark and that petitioner informed him that he could not do anything with the papers. Petitioner was then arrested with the papers in his possession early in the morning on the 1st of November. Rosenberg's testimony was uncorroborated except that Eleanor Strom testified that she saw him converse with petitioner at 50th Street and Broadway and that she saw petitioner at Newark later that evening. She did not, however, hear the alleged conversations.

From this testimony there is no doubt that Rosenberg and petitioner could be charged and convicted of conspiracy to dispose of the alleged travelers cheques. However, this is not a federal offense. Receiving stolen goods and conspiring to dispose of the same is strictly a state matter, unless the agreement reached specifically involves

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crossing state lines. Nowhere in the entire record of this case is there any agreement between the alleged co-conspirators to transport the papers involved in interstate commerce.

The fact that petitioner was arrested with the papers in New York is of no probative force in connection with conspiracy count since it is equally consistent with guilt or innocence of the petitioner. Whoever transported the papers may well have conceived his own scheme to take them to New York after he had received them from Rosenberg.

It still takes two or more persons to form a criminal conspiracy. Where one agrees to dispose of stolen property and there is no specific agreement as to the manner or place in which such property is to be taken for disposal, and that person, after receiving the property on his own initiative decides to transport it in interstate commerce, he may be guilty of the substantive offense of transportation, but there would be no conspiracy to transport. Under the facts adduced at this trial, by the government witnesses, it is entirely possible that there was no agreement to transport these securities to New York and that any person who did so transport them acted on his own sole individual initiative.

The circumstances of the alleged travelers cheques being found in New York is not proof of a conspiracy to so transport in interstate commerce. In order to justify the conviction of crime on such circumstantial evidence, it is necessary that the directly proved circumstances be such as to exclude every reasonable hypothesis but that of guilt (*United States* v. *Baker, et al.*, 50 F. [2d] 122, 123; *United States* v. *Russo*, 123 F. [2d] 420, 423).

There is no fetish about a conspiracy charge. It must be proven like any other charge in a case. Rosenberg's testimony is merely to the effect that he asked petitioner if the latter could dispose of certain papers, and that the

petitioner told him he would try and see what he could do. This falls far short of an agreement to transport the papers in Interstate Commerce. The Jury found that appellant was not guilty of either transporting these papers or causing them to be transported in Interstate Commerce. It must, therefore, be presumed that the appellant's conviction on conspiracy charge is based on evidence other than that propounded by the Government in support of the substantive offense. There is no other such evidence in this record. The entire indictment thereby falls, as being unsupported by the evidence and should be set aside.

In *United States* v. *Silva*, 131 F. 2d 247, the Court stated on page 249:

> "It was necessary to show that the appellant had agreed to act in concert with someone to commit the substantive crimes charged. * * * There is no magic about a count charging conspiracy. It is simply an accusation of a distinct crime and evidence in support of it must be so clear and convincing as to leave no reasonable doubt. The government merely fails in its proof when its evidence but creates a sort of mystery as to which one guess is as good as another. *Copeland* v. *United States*, 5 Cir., 90 F. 2d 78; *Shannabarger* v. *United States*, 8 Cir., 99 F. 2d 957; *Kassin* v. *United States*, 5 Cir., 87 F. 2d 183. Reversed."

There is considerable authority to the effect that there can be no conspiracy concerning the transportation of stolen articles in Interstate Commerce unless it is understood to be a part of the project that they plan to cross State lines.

> *U. S.* v. *Crimmins* (2nd Cir.), 123 F. 2d 271, 273;
> *Gable* v. *United States*, (7th Cir.) 84 F. 2d 929, 930;

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Linde v. *United States* (8th Cir.), 13 F. 2d 59;
Crain v. *United States* (5th Cir.), 148 F. 2d 615, 617, 618.

In the case at Bar, there was no evidence of an agreement to transport across State lines in Interstate Commerce.

In *United States* v. *Penn, et al.*, 131 F. 2d 1021, 1022, the two defendants were charged with conspiring to transport kidnapped persons in interstate commerce. The Court stated:

> "Thus the case at best was no more than that, although they had agreed to kidnap, they had not settled upon any place where they should conceal those kidnapped, and especially that they had not settled that they should take them outside the state. It was necessary for them to agree upon that; Sec. 408c is explicit, it is a corollary of Sec. 408a, which makes it a crime to transport a kidnapped person in interstate commerce. Men do not conspire to do that which they entertain only as a possibility; they must unite in a purpose to bring to pass all those elements which constitute the crime. The accused never went so far as to this vital element of the crime, and an acquittal should have been directed."

In *Crain* v. *United States* (*supra*) wherein the defendants were convicted under an indictment charging conspiracy to transport stolen monies of a value of over $5,000 in Interstate Commerce, a motion for a directed verdict was made at the close of the evidence. Neither of the appellants took the stand, and no witness testified to knowledge of any agreement between the appellants to transport the stolen money in Interstate Commerce. One of the appellants had left Miami and gone to Minneapolis

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and the other two were at the point of leaving Miami for other states when arrested. It was held that this did not show an unlawful agreement to transport in Interstate Commerce. The Circuit Court of Appeals in reversing the conviction for conspiracy stated at page 617:

> "Interstate Transportation must be involved in the conspiracy to support a conviction. There is no evidence in the record to sustain such a charge."

The case at Bar is no different either factually or legally. It is submitted that the conviction on Count 2, for conspiracy should be set aside.

The Circuit Court, at pages 1487 and 1488 of its opinion stated that since Rosenberg delivered the checks to petitioner in New Jersey who was rooming in New York that the inference was plain that the conspirators contemplated such transportation. In view of the authorities cited herein, it is submitted that the Circuit Court could not indulge in such inference. There was no testimony as to any agreement as to where the securities were to be disposed of or that they were in fact to be transported in interstate commerce. It is the present contention that in order to convict under the special conspiracy statute herein and to prove such conviction beyond a reasonable doubt, that an express conspiracy to transport across state lines must be proven. In addition, the inference was just as plain that the petitioner could have disposed of the checks in New Jersey without taking them to his room in New York, which brings us back to the old rule that where there are two hypotheses based upon inference and presumption, one of which leads to innocence and the other to guilt, the doubt must be resolved in the petitioner's favor (*United States* v. *Baker, supra, United States* v. *Russo, supra*).

We submit that this court has never passed upon the point that the proof necessary to convict under a special

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conspiracy statute such as the one involved here must be direct proof of an express agreement to transport across state lines. There must have been some reason for Congress to enact special conspiracy statutes when the general conspiracy statute contained in Title 18, Section 88 would have sufficed. The reason is that under the special statute, such as contained in Title 18, Section 418a, it is a conspiracy to commit a specific type of crime and it follows that the specific species of conspiracy must be expressly proven since there is no federal offense where there is no express agreement to cross state lines. It is still a maxim of law in this country that a defendant cannot be convicted unless it is upon evidence which shows his guilt beyond a reasonable doubt and that he is presumed innocent until proven guilty by the credible evidence at his trial.

This court should grant certiorari herein and rule upon the appeal, that the proof necessary to convict under the special conspiracy statutes must necessarily be of an affirmative nature which proves an express agreement to transport in interstate commerce.

IV.

Since petitioner was acquitted on the count charging the substantive offense, his conviction under the count charging conspiracy to commit the substantive offense, being supported at the trial by identical proof, was error, in that it constituted a conviction for a charge which was res judicata and said conviction should have been reversed by the Circuit Court of Appeals.

Petti was acquitted on the charge of transporting, or causing to be transported, stolen securities in interstate commerce. It must follow therefrom that he did not either transport, or even cause the alleged securities to be transported. The Jury, however, found Petti guilty of conspiring to do this.

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The entire case, covering the two counts, consisted of a single transaction concerning a package of alleged travelers' checks which the petitioner contended were papers of no value whatsoever.

The evidence introduced by the Government to prove the commission of the offenses alleged in both counts was identical as to each count. Acquittal of the charge of transporting, or causing to transport, securities over the value of $5,000 in Interstate Commerce, therefore, becomes *res adjudicata* of the charge of conspiracy to do so in violation of law. The defendant could not be convicted of conspiracy on the same evidence offered in proof of the substantive charge for which he was acquitted. Where the Government had to rely on the self same evidence in both counts, the acquittal on one was a complete bar to the other.

In *Sealfon* v. *United States*, Vol. 92, Law. ed. 215, adv. op. No. 6, this Court stated at page 217 of the opinion:

> "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *United States*, 328 U. S. 640, 643, 90 L. ed. 1489, 1494, 66 S. Ct. 1180. Thus, with some exceptions, one may be prosecuted for both crimes. Ibid. But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States* v. *Oppenheimer*, 242 U. S. 85, 87, 61 L. ed. 161, 164, 37 S. Ct. 68, 3 A. L. R. 516; *United States* v. *De Angelo* [C. C. A. 3d N. J.] 138 F. 2d 466, 468, annotation in 147 A. L. R. 991; see *Frank* v. *Mangum*, 237 U. S. 309, 334, 59 L. ed. 969, 983, 35 S. Ct. 582) and operates to conclude those matters in issue which the verdict determined though the offenses

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be different. See *United States* v. *Adams*, 281 U. S. 202, 205, 74 L. ed. 807, 808, 50 S. Ct. 269.

Thus the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial."

After determining that the evidence at both trials was identical, the Court stated further on page 218:

> "It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

The fact that the defendant was tried on two counts on one trial is no different than if he had been tried on two separate occasions on two different indictments, where the proof for each indictment was identical.

Each count in an indictment is regarded as if it were a separate indictment. Whether offenses are separately charged in the counts of a single indictment or if they are charged in separate indictments and separately tried, the same rule must hold (*Dunn* v. *United States*, 284 U. S. 390, 393, 76 L. Ed. 356, 358-359).

This is not a case of attempting to reconcile an inconsistent verdict by the Jury. To the contrary, the appellant contends that a Jury having found that he was not guilty of either transporting "securities" or causing them to be transported, could not find him guilty of conspiring to do so without subjecting him to double jeopardy since the adjudication on the substantive charge included

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any other charge brought against the appellant which the Government offered to prove by the same evidence adduced to prove the said substantive charge.

The Circuit Court held in its opinion that the doctrine of the *Sealfon* case, *supra*, applied only to a situation where there were two separate trials. It is submitted that this was a misapplication of the doctrine and that in view of *Dunn* v. *United States, supra,* it makes no difference whether the counts were laid in separate indictments in two separate trials or whether they were laid in one consolidated indictment at one trial. Acquittal on the substantive charge is *res judicata* of the conspiracy charge where both charges are sought to be proved by the same evidence. In view of the rulings in both *Dunn* v. *United States, supra,* and *Sealfon* v. *United States, supra,* it is submitted that this court should grant certiorari to formalize the rules in both cases so that the courts of the United States may have the benefit of a clear doctrine to apply to criminal cases involving conspiracy. We believe it was the intention of this court to abrogate the practice of jointly charging substantive offenses and conspiracies, if such practice is unwarranted in the evidence, to preclude subjecting defendants to shotgun like indictments, in which, if the charge from one barrel missed the other would hit the target.

CONCLUSION.

For the reasons assigned and the authorities in support thereof, this Court should grant the writ of certiorari to petitioner, and, upon the appeal which shall be heard thereon, reverse petitioner's conviction.

Respectfully submitted,

EDWARD HALLE,
Attorney for Petitioner.

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APPENDIX.

SUPREME COURT OF THE UNITED STATES.

ALBERT RALPH PETTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Motion to Dispense With Printing of the Record Upon the Proceedings on the Petition for Writ of Certiorari Herein.

Upon the annexed affidavit of Edward Halle, his attorney, petitioner moves for an order of this court to dispense with the printing of the transcript of record and exhibits for use on the proceedings on the petition for writ of certiorari herein and that a certified copy of the typewritten record which was used before the United States Circuit Court of Appeals for the Second Circuit be considered on the said proceedings in lieu of printed copy of the said record.

Dated—June 23, 1948.

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Affidavit of Edward Halle in Support of Motion.

SUPREME COURT OF THE UNITED STATES.

ALBERT RALPH FETTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

EDWARD HALLE, being duly sworn, deposes and says:

I am the attorney for the petitioner herein. The facts concerning this cause are set forth in the petition printed herewith.

On March 1, 1948, the United States Circuit Court of Appeals for the Second Circuit, Judges Hand, Swan and Frank sitting, ordered that the petitioner might file three typewritten copies of the record for use on the said appeal before the Circuit Court in lieu of a printed record. As a consequence, the record was not printed. Three typewritten copies of the transcript were prepared and filed. Following page 249a in the typewritten transcript of record, there is a stipulation concerning the exhibits which in effect states that counsel could hand up at the argument before the Circuit Court any exhibit which was considered relevant to the argument. None of the exhibits were

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handed up at the argument. However, a facsimile of Government's Exhibit 2 which consisted of blank travelers cheques was used at the argument. This facsimile was transmitted to the clerk of this honorable court, together with a certified copy of the typewritten record, and was certified as being used on the argument by the clerk of the United States Circuit Court for the Second Circuit. There are no printed copies of the transcript of record in existence as result of the order permitting the typewritten copies to be filed.

I have consulted with the petitioner and he has informed me that it would be an extreme hardship to pay the cost of printing the record for use on these proceedings for petition for writ of certiorari. He has assured me, however, that if certiorari is granted by this honorable court he will be able to borrow the necessary funds to print the record for the use of this court upon subsequent argument.

I verily believe that there are questions of law involved herein which merit the consideration of this honorable court upon petition for writ of certiorari and that upon such consideration that this honorable court should grant certiorari. Unless the court should grant the instant motion to dispense with the printing of the record for these proceedings, the petitioner will be foreclosed from presenting to this court grave questions of law which, if left unsettled, would deprive him of not only his constitutional rights but also of his liberty.

WHEREFORE, your deponent prays that this honorable court issue its order to dispense with the printing of the transcript of record and exhibits, for use on these proceedings for petition for writ of certiorari, and to consider the instant petition upon the certified copy of the typewrtten

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transcript of record used by the United States Circuit Court of Appeals for the Second Circuit and the facsimile of Government's Exhibit 2 which has been certified as being used on the argument before the United States Circuit Court of Appeals.

/s/ EDWARD HALLE.

Sworn to before me this
23rd day of June, 1948.

/s/ PHILIP F. HALLE
Notary Public
in the State of New York
Qualified in Kings County
Kings Co. Clk's No. 477, Reg. No. 424-H-9
Certificates Filed in
N. Y. Co. Clk's No. 813, Reg. No.
Queens County Register's No. 348-H-9
Commission Expires March 30, 1949

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CLERK

IN THE

Supreme Court of the United States

October Term, 1948.

No. 118.

ALBERT RALPH PETTI,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

EDWARD HALLE,
Attorney for Petitioner.

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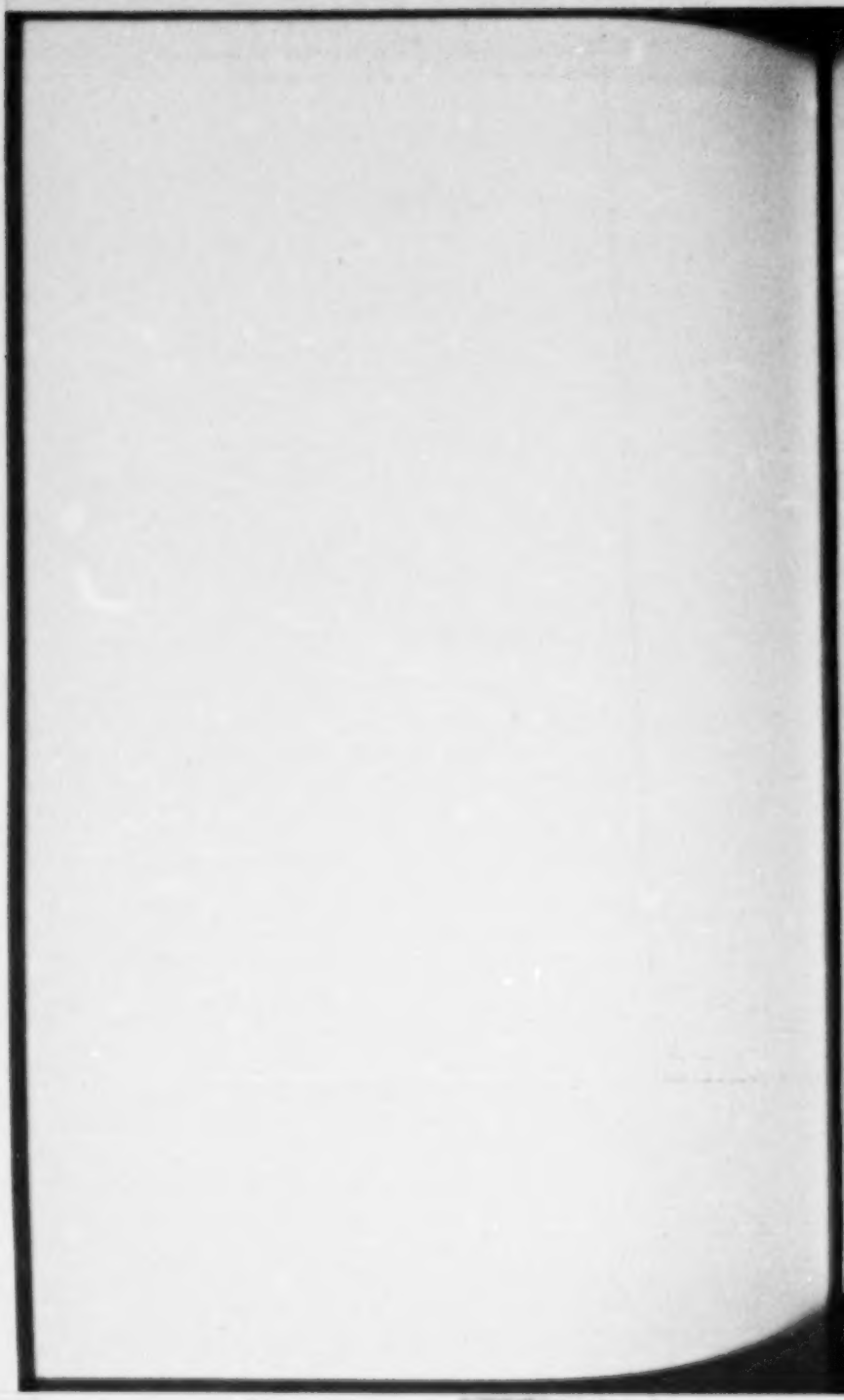

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

ALBERT RALPH PETTI,
Petitioner,

v.

UNITED STATES OF AMERICA.

No. 118.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Court of Appeals (85-89)* is reported at 168 Fed. (2d) 221.

Statement.

The petitioner was convicted in the District Court for the Southern District of New York for conspiracy to transport stolen securities in interstate commerce, in violation of 18 U. S. C., Section 418(a). He was sentenced to three years imprisonment and fined $2,500. Following conviction the petitioner was continued on bail pending disposition of his appeal to the Court of Appeals for the Second Circuit.

*Arabic numerals in parentheses, unless the context otherwise indicates, refer to page numbers in the printed Transcript of Record.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 25, 1948 (89). On June 3, 1948 Circuit Judge Chase denied a motion made on behalf of petitioner for the Court of Appeals to stay the issuance of a mandate to the District Court. Application was then made to Justice Jackson of this court and a temporary stay of mandate was granted on June 8th to and including June 14, 1948. On June 14, 1948 an order of this court was signed by Mr. Justice Jackson to stay the mandate of the United States Court of Appeals, providing that petition for certiorari was filed within the statutory period provided by law, and further that if a petition for certiorari is duly filed the stay to continue pending the ultimate decision of this court.

The petition for writ of certiorari and supporting papers were duly filed on June 24, 1948. This court granted the petition for writ of certiorari on October 11, 1948 (90). The petitioner is now at liberty on continued bail.

The jurisdiction of this court is conferred by Title 28, U. S. C., Section 1254(1).

Indictment.

The indictment contained two counts. Count I charged that the petitioner and one, Charles Solomon Rosenberg, unlawfully transported and caused to be transported in interstate commerce, securities of the value of over $5,000 which had theretofore been stolen, knowing the securities to have been stolen. The particular securities enumerated in Count 1 of the indictment were 185 American Express Travelers checks of the value of $5,400 and 128 American Express Money Orders of the value of $6,850. It is alleged that these instruments were caused to be transported from the City of Newark, New Jersey to the City of New York

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and were previously stolen from the American Express Company in Atlantic City, New Jersey. The count is laid under Title 18, United States Code, §415.

Count 2 of the indictment charged the petitioner and Rosenberg and other persons with conspiracy to violate Title 18, Section 415 of the United States Code, in that they conspired to transport securities of the value of over $5,000 from Newark, New Jersey, to New York, New York, in violation of §418(a), Title 18, U. S. Code. The jury returned a verdict of Not Guilty as to Count 1 and Guilty as to Count 2 of the indictment.

Thus, while petitioner was acquitted of the substantive offense of transporting, he was convicted of conspiracy to transport, although the proof for the conspiracy was identical with the proof for the substantive charge, as will be brought out hereinbelow.

Facts.

(1) Concerning Search and Seizure.

On October 31, 1945, four officers of the Federal Bureau of Investigation were assigned to arrest the petitioner (26, 43, 54, 59), on a charge or charges wholly unrelated to the charges in the indictment under which petitioner was convicted and sentenced herein (34, 36). Having had the information that petitioner was registered at the Hotel Taft in room 340 (43, 59), they proceeded to the hotel and arrived that evening at 7:30 P. M. (26, 43, 54). One of the agents called room 340 on the hotel house phone but received no answer (43); thereupon two of the agents were stationed in the hotel lobby (27, 54), and the other two ascended to room 340 accompanied by an assistant manager (27, 31, 43), with whom arrangements had been made to gain access to the room (33). The hotel man rapped on the door and, receiving no response, opened it with a passkey (44).

The two agents entered the room. The manager stayed outside of the room, locking the door behind them (44). The investigators then made a search of the room, closet and bathroom, after which they were satisfied that the petitioner was not present (44).

While there was testimony by one of the agents that a bench warrant had been issued for petitioner's arrest on the above mentioned unrelated charges, none of the agents had a copy of such warrant with him when entering petitioner's room or during his arrest which occurred some six hours later (34, 37). There was no search warrant to search room 340 of the Hotel Taft (34).

While the propriety of the officer's entry into the room in the first instance may well be questioned, it is certain that having ascertained petitioner's absence, their continued presence in the room was highly improper and a substantial violation of the petitioner's constitutional rights, in view of the lack of a search warrant.

Petitioner returned to his room at 1:30 A. M. the following morning, letting himself in with his key (44). He was arrested and searched personally by the two agents who had remained in his room continuously from 7:30 P. M. the evening before (34, 44, 45, 55). The two agents who had remained in the lobby during this time were then summoned and reported to room 340 (55). A search of the room was then repeated during which the agents found a suitcase in the closet, which contained a paper bag, in which blanks for Travelers checks and American Express Money Orders were found (27, 28, 45-47, 56).

(2) Concerning the Alleged Conspiracy.

It was not until November 2, 1945 that the agents learned of the source of these papers (Typewritten Record, p. 140), and on that date a warrant for petitioner was issued (Typewritten Record, p. 136).

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Thus, after the papers were found in petitioner's possession in the manner described above, the government adduced the following information: On October 26, 1945, a quantity of blank American Express Travelers checks and money orders were stolen from the Atlantic City, N. J. office of the American Express Company (13, 14). On October 27th, an individual by the name of Cash, who was involved in the larceny, brought these papers to petitioner's alleged co-conspirator, Charles Solomon Rosenberg, at his house in Newark, N. J. (17). Rosenberg did not want them; however, at Cash's insistence, he kept the papers and loaned Cash about $30 or $40 to pay his rent (15, 18). Cash did not tell Rosenberg where he got the papers (18).

Rosenberg testified that he went to the Roxy Theatre in New York the next day (October 28, 1945) with Eleanor Strom, and met the petitioner, *quite by accident*, at Fiftieth Street and Broadway (19). He testified further that he told petitioner about the papers in evidence and inquired as to whether petitioner could do anything with them and that pettiioner said he would see and was told to come over to Newark to get the papers. Eleanor Strom was not a witness to their alleged conversation (20). Later that evening petitioner met Rosenberg in Newark and he testified that petitioner took the papers and said, "I will see what I can do with them" (21). This conversation lasted only a few minutes and the two of them were alone (22). Rosenberg testified that he saw petitioner a few times after and told him that if he did not get rid of the papers to return them and he says petitioner told him he could not get rid of the papers (22). These alleged visits were at Rosenberg's house at 133 Mt. Pleasant Avenue, Newark, N. J. (17, 22).

There was also evidence that petitioner had made telephone calls to Rosenberg but the only evidence as to the content of any of the calls was Rosenberg's testimony that on the 28th, petitioner called him and said he would be over (22).

At 1:30 A. M., November 1st, petitioner was arrested as aforesaid at the Hotel Taft, New York, N. Y., with the papers in his possession.

It was on the above mentioned evidence that the jury acquitted petitioner of the substantive charge of transporting but convicted him of conspiring to transport stolen "securities" of a value of more than $5,000 from Newark, N. J. to New York.

(3) Concerning the Alleged "Securities" Described in the Counts of the Indictment.

Government's Exhibit 2, consists of several papers in the usual form of travelers checks issued by the American Express Company. They are incomplete in that the spaces for the required signature and counter-signature of the purchaser are blank.

The purchaser must sign the check in the presence of an employee of the company before it is issued (24, 25). As a matter of fact, even after its issue, the paper does not become a check until it is countersigned with the signature of the purchaser in the presence of the person cashing it. This information is contained on the face of the paper itself (Govt. Exh. 2, upper left and lower left corners).

Government's Exhibit 3 consists of papers in the usual form of money orders issued by the American Expreses Company. These papers are also incomplete in that they lack the signature of the company issuing officer or agent (24).

The face of each of the papers described in both Exhibits 2 and 3 includes a denomination of amount in dollars which presumably is the value of the paper after it is issued for value and properly endorsed. The total of such denominations of the alleged travelers checks is $5,400 and of the alleged money orders is $6,850.

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After the Government rested, petitioner's counsel moved to dismiss the indictment for lack of proof (63). The trial court ruled that the money orders had no value and struck reference to them from the indictment (67). However, the question of value of the alleged travelers checks (Govt. Exh. 2) went to the jury (67, 70).

The Questions Presented.

The following questions arise as a result of the action of the trial court as affirmed by the Circuit Court of Appeals:

1. Is a search made properly incident to an arrest where federal officers entered the petitioner's abode in his absence and without his permission and waited in the said premises as trespassers for six hours until he arrived, whereupon they arrested him and discovered the evidence herein, consisting of the alleged travelers checks?

2. Are blank travelers checks which are stolen before issuance to a purchaser, being incomplete in not having thereon the proper signatures necessary for negotiation, securities within the meaning of Title 18 U. S. C., Section 415?

3. Can petitioner be convicted of conspiracy to violate the National Stolen Property Act under the provisions of Title 18, U. S. C., 415(a), where there is no proof in evidence that petitioner conspired specifically to cause anything to be transported over state lines?

4. Since the proof as to the substantive charge contained in count 1 and the conspiracy charge contained in count 2 was identical, was the petitioner's acquittal on count 1 *res judicata* with relation to the charge in count 2 upon which the petitioner was found guilty, in view of this

court's recent decision in *Sealfon* v. *United States*, 332 U. S. 575, when read in conjunction with *Dunn* v. *United States*, 284 U. S. 390, 393?

Constitutional Amendment Involved.

"Amendment IV—Searches and Seizures.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

ARGUMENT.

I.

The alleged travelers checks, Government's Exhibit 2, were obtained as result of illegal search and seizure and should have been suppressed. Failure on the part of the trial court to do so and affirmance by the Circuit Court of Appeals constitutes reversible error.

A.

Before the officers gained entrance to petitioner's room they knew he was not in it (43). Upon entering they were convinced he was not there (44). Yet they waited in his room as mere trespassers until his return, *six hours later*, at which time they arrested him and found Government's Exhibit 2, the alleged travelers checks, in his closet.

It is submitted that the search, without search warrant, was unreasonable and illegal. In answer, the contention will probably be made that the search was incident to a legal arrest. This contention is untenable. Assuming,

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arguendo, that the officers had every right to search petitioner's room for the purpose of arresting him, as soon as they discovered that he was not there, it was certain that no arrest could be made within the room. Their right to remain in the room, if such initial right existed concerning the search for petitioner's person for the purpose of arrest, dissipated. The agents should have left it immediately upon finding the room vacant (*United States* v. *Vallos*, 17 F. (2d) 390, 391).

It would have been proper for them to wait in the corridor, if they wished, and to arrest him on his return to the hotel. If they did so, however, they would have had no right to search petitioner's room as an incident to such arrest (*Agnello* v. *United States*, 269 U. S. 20, 32; *United States* v. *Steck*, 19 F. (2d) 161, 163; *United States* v. *McCunn*, 40 F. (2d) 295, 296).

If the officers could not properly search the room after arresting petitioner outside of it, they certainly could not wait in the room to which they obtained entry without the knowledge or consent of petitioner and make their search incident to arrest, merely because they chose to set the place of arrest in that particular room improperly, and without right (in addition to the authorities cited above see dissenting opinions *Harris* v. *United States*, 331 U. S. 145).

The Trial Justice recognized the validity of this reasoning but did not apply it in this case because the place of petitioner's abode was a hotel room, and he did not feel that a hotel room came within the provisions of the Fourth Amendment (64-67). It is submitted that the court committed reversible error in ruling that a hotel room was not the same as a "private mansion" (65).

Since the ruling in the instant case, the question has been resolved in a recent decision by this court, wherein the defendant challenged the search of a hotel room as an incident of her arrest. The opinion in the case conclu-

sively shows that the protection of the Fourth Amendment extends to hotel rooms (*Johnson* v. *United States*, 333 U. S. 10).

The Circuit Court of Appeals distinguished this court's ruling in the *Johnson* case, *supra*, on the ground that no warrant had been issued for the arrest of the defendant in that case when the officers gained access to her hotel room to arrest her, stating that in the instant case, since a bench warrant had been issued for the petitioner, the officer had a right to enter his room. What the Circuit Court of Appeals overlooks is that in the *Johnson* case the defendant was in her room when the officers entered, whereas in this case the room was vacant when the officers entered and remained vacant for a period of six hours until the petitioner returned. It is submitted that whether the officers were acting under the authority of an arrest warrant or not they had no right to remain in the room for six hours. The warrant may have entitled them to force their way into the room for the purpose of arresting the petitioner (*U. S.* v. *Faw*, Fed. Cas. No. 15,079, 1 Cranch, C. C. 487, 1 D. C. 487), but once having done so and finding the petitioner absent, the reason for their original entry ceased to exist.

It is incontrovertible that whether the officers did or did not have an arrest warrant they could not arrest anybody who wasn't there and, consequently, they had no business to stay on the premises for the next six hours. It is submitted that the federal agents waited in the petitioner's room for that length of time merely for the purpose of being able to make what they considered a search properly incident to an arrest. A search made under the circumstances is not a search made incident to a legal arrest. It violates the mandate of the Fourth Amendment.

The Court of Appeals cited *Harris* v. *United States*, *supra*, as authority for the fact that the search in this case was incidental to a legal arrest and, therfore, a rea-

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sonable one (87). Assuming, *arguendo,* that the arrest was properly made in the petitioner's hotel room and that the *Harris* case, *supra,* is to be cited as a general authority for searches incidental to arrest, there would be no grounds herein for appealing this point to this court. Counsel is arguing, however, that the arrest was not properly made in the hotel room for the reasons stated above and now wishes to advance the further argument that the rule in *Harris* v. *United States, supra,* is not one for general application but should be strictly limited to the state of the facts as found in that case. The majority of this court held in that case that an extensive search for specific evidence of a particular crime after an arrest, pursuant to an arrest warrant, which took place in the accused's apartment did not violate the provisions of the 4th amendment prohibiting unreasonable searches and seizures, even though the evidence seized at the time had no relation to the crime for which the accused was arrested. Four of the justices of this court dissented and three of them wrote strong dissenting opinions. The gist of the dissenting opinions was that the officer or officers who could secure a warrant for the arrest of an individual could, by timing their arrest to take place in the home of that individual, secure a general, unlimited search of his home which might not be possible upon so broad a scope even after the issuance of a search warrant for probable cause. Such a general search is reminiscent of the days before the hardwon independence of this country was established when a general warrant could be secured to harass the privacy and liberty of the original colonists of this country. Indeed, such a search may even be broader than that under the general warrant. It is most respectfully submitted that the majority rule of *Harris* v. *United States, supra,* if it is to stand as authority for the conduct of searches and seizures as incident to lawful arrests,

should be limited strictly to the facts upon which it is based.

This court has indicated in *Trupiano* v. *United States*, 92 Law Ed. 1198, Adv. Op. No. 18, at page 1204, that the *Harris* rule should not be applied generally. The court stated that it did not on that occasion re-examine the situation involved in *Harris* v. *United States, supra*, but did confine the decision "to the precise facts of this case, leaving it to another day to test the Harris situation by the rule that search warrants are to be obtained and used whenever reasonably practicable."

In *Harris* v. *United States, supra*, the object of the search was to find two $10,000 cancelled checks which had been stolen from the office of the Mudge Oil Company. There was evidence connecting the petitioner with that theft. In addition, the officers were looking for means or tools that might have been used to commit the burglaries (see p. 148 of the opinion). The court indicated in the opinion that the search was not a general exploratory one to secure evidence to connect the accused with any crime made under cover of the making of the arrest, but that it was a specific search for evidence of the crime for which the accused was arrested, particularly the two mentioned cancelled checks. The search was appropriate for the discovery of such objects. It followed that they were properly subject to seizure. It turned out that during the search the officers found certain draft cards. This court indicated that the draft cards which were so found and, in fact, seized fell within that class of objects properly subject to seizure, since such cards were the property of the United States and were in the illegal custody of the petitioner and the government was entitled to possession of its property (see opinion of this court, pp. 153, 154).

Thus, the majority decision in *Harris* v. *United States* stands for the authority that where a search is made incident to a legal arrest for evidence concerning the crime

for which an accused is arrested, if any government property which is illegally in the accused's possession is found, it is subject to seizure even though not related to the crime for which the accused was arrested. It is respectfully submitted that this is the limited ruling in the case of *Harris* v. *United States, supra,* and that the mentioned case is not a general authority that any evidence of any other crime found during a search incident to a legal arrest may be seized.

In the instant case the officers sought to arrest the petitioner on the basis of a bench warrant which had been issued in connection with certain violations of the O P A laws. When he was arrested the officers found the alleged travelers checks upon which the instant prosecution was based. These alleged checks were not United States Government property and the facts are thus distinguishable from the facts in the *Harris* case, *supra.*

A further distinguishing point is that the search in the instant case was not a search for any specific evidence; it was just a general aimless rummaging around in the belongings of the petitioner, with the hope that something or anything might be found. There is no evidence in the record here to show that the officers were searching for anything which might be connected with the crime for which the petitioner was arrested. As a matter of fact those portions of the record which concern the testimony relating to the search show that it was a general search for anything that it might reveal.

It is respectfully submitted that even though the Court of Appeals below decided that the search and seizure herein was lawful on the authority of *Harris* v. *United States, supra* (87), such decision constituted reversible error even if the ruling in the *Harris* case should stand as a general authority for situations not involving the precise factual situation therein. In the *Harris* case the peti-

tioner was arrested when the federal officers entered his apartment. As was pointed out hereinabove, in the instant case the petitioner Petti was not arrested until six hours after the federal officers entered his room and had determined that he was not present.

It is this lapse of six hours which further distinguishes the facts on this appeal from that in the *Harris* case.

The trial court recognized that such a search was not incident to arrest but refused to suppress the evidence because it considered that a hotel room was not within the purview of the Fourth Amendment. The Court of Appeals, while agreeing that the question of hotel room did not remove the search from the Fourth Amendment, held that the search was incident to a legal arrest by warrant and therefore valid.

It is respectfully submitted that both courts were in error since (1) a hotel room is no different from a private home and comes within the prohibition against illegal searches and seizures contained in the Fourth Amendment, and (2) federal officers may not circumvent the constitutional safeguards contained in the Fourth Amendment, even though they are acting under an arrest warrant, where they remain on the petitioner's premises for more than six hours after they discover that he was not there.

B.

The officers testified that the papers in evidence were not discovered until after petitioner's arrest, and the Circuit Court based the legality of the search upon legal incidence to the said arrest. However, it is submitted that the officers did search the room when they originally entered; therefore, whatever was found in petitioner's room, even if chronologically subsequent to his arrest, was tainted by the unauthorized presence of the officers for a period of six hours before his return. If he had not returned, the

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instant search would clearly have been an unreasonable one. It was the unauthorized and illegal trespass of the officers that brought the fruits of the exploratory search to light. A continuing search under such circumstances is both unreasonable and illegal (*Taylor* v. *United States*, 286 U. S. 1, 5, 6).

II.

Failure to dismiss the indictment was reversible error since the blank forms, which when properly filled out would be American Express Travelers Checks, were of no value, and were not securities.

In order to prove the charge in count 2 of the indictment alleging conspiracy to transport knowingly stolen securities of a value of over $5,000, it was necessary for the Government to establish that the papers in evidence were securities of a value of over $5,000. At the outset it is submitted that the papers contained in Exhibit 2 were not securities. On the face of each blank, in the upper left-hand corner, appears the following definition of the paper itself:

> "U. S. Dollar Travelers Cheque
> When Countersigned Below With
> This Signature
> ....."

Directly below in the lower left-hand corner there appears:

> "Countersign Here in Presence of Person Cashing
> ....."

Thus, by definition on the paper itself, it does not become a check or "security" until both signatures are properly and duly placed thereon. In the present blank form it was never intended nor could it be said to be a security.

These incomplete papers were stolen before they had been issued. There are innumerable rulings that an instrument stolen before completion and issuance has no standing as a negotiable instrument and has no value (*Ledwich* v. *McKim*, 53 N. Y. 307, 313; *Davis Sewing Machine Co.* v *Best*, 105 N. Y. 59, 67, 68; *Holzman, Cohen & Co.* v. *Teague*, 172 App. Div. 75, 158 N. Y. S. 211; *Nicholaras* v. *Stewart*, 25 N. Y. S. [2d] 157).

The conspiracy count defines these incomplete papers as "securities" of a value of over $5,000. There is no charge contained in the conspiracy count that they had been forged or that there was any intent on the part of petitioner or anyone else to forge them. If the government intended to rely on a forgery the definition of the conspiracy could have been based on that portion of the statute which relates to transportation of forged instruments, which contains no requirement of value of over $5,000. The pertinent part of the substantive statute (Sec. 415, Title 18, U. S. C.)* concerning forgeries is:

> "* * * or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, * * *."

However, the indictment did not charge an offense readable on this forgery section of the statute. The instant charge of conspiracy involves a crime defined by that portion of the substantive statute which reads as follows:

*All sections of Title 18 of the United States Code were repealed by the recodification of Title 18 which took effect on September 1, 1948. However, any right or liability which existed concerning the pertinent acts at the time of the repeal was not affected thereby (Chapter 645, Public Law 772, Sections 20, 21). In the new codification the old Section 415 is now rewritten as Section 2314.

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"Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken * * *."

There can be no implication of a future forgery with relation to the instruments set forth in this indictment. The Government cannot indulge in if's, and's or but's. What anyone would do with these papers, or could do to them, with intent to defraud is of no moment. The petitioner is not on trial for forging securities, much less thinking about doing so. He was convicted of conspiring to transport *securities*. The evidence submitted in proof of this charge must by a clear, cool appraisal actually reveal securities of a value of over $5,000, in the physical form in which they existed at the time of the alleged conspiracy. It is not a federal offense to forge securities. It is only an offense to transport forged securities over state lines.

The blank forms in evidence are not securities and have no value other than the paper and ink of which they are comprised. The papers in evidence are neither fish nor fowl; they are neither securities nor forgeries and so do not come under any of the penal provisions of Title 18, U. S. C., Section 415 or 418(a).

Nevertheless, the Court of Appeals, after stating that the authorities were not in accord as to precise legal characteristics of travelers checks before they have been completely filled out, decided that these checks came within the definition of securities as contained in Title 18, Section 415, and that they were of a value equivalent to the face value printed on each paper (88). The rationale of this

decision is that if the theft of the checks had occurred *after* issuance to a purchaser they would be a security for the purposes of the National Stolen Property Act (*Pines* v. *United States*, 123 Fed. [2d] 825, 828, C. C. A.). What the court overlooked was that the *Pines* case involved an indictment under that portion of Title 18, Section 415 quoted hereinabove involving the fraudulent transportation of falsely made or counterfeited securities. It did not involve the transportation in interstate commerce of securities of the value of over $5,000 known to have been stolen, as was charged herein. The case is entirely distinguishable in that not only was the charge different but the proof of such charge was different.

In the instant case, petitioner was charged with transporting stolen securities in interstate commerce of a value of over $5,000, knowing the same to have been stolen, and also with conspiracy to commit the substantive offense. It was, therefore, necessary to prove (1) that securities were stolen; (2) that petitioner conspired to transport same in interstate commerce knowing them to have been stolen, and (3) that they were securities of a value of more than $5,000.

In the *Pines* case, the charge was transporting forged, altered and counterfeited securities unlawfully and with intent to defraud, to wit, a travelers check purportedly issued by the Gotham Trust Company of New York, a fictitious bank, in the denomination of $100, knowing the same to have been falsely made, forged and altered. The Government's proof in such a case consists of showing the false character of the alleged security and proving the fraudulent intent. It would not be necessary to prove value of over $5,000, or that the instrument was theretofore stolen, within the knowledge of the defendant.

It may readily be seen that the charges involved in the two cases are totally different and that the decision in the *Pines* case is not authority for the fact that blank travelers

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checks stolen before issuance have value. The *Pines* case merely stated that since the purported travelers check involved was allegediy countersigned by a purchaser, and since a valid travelers check is complete as against a bank "when issued", the spurious paper constituted a false security within the purview of the Act because falsely made to simulate a valid travelers check. This holding merely affirms the language of the statute which says that it is a crime to transport a forged security across the state line for a fraudulent purpose. It is not authority that an incomplete, unissued security which is stolen before issuance has value or is a valid security.

The Court of Appeals, in addition to following the *Pines* case as aforesaid, went even further in order to place the facts of this case into the frame of the *Pines* case. The court stated, in referring to the wholly unexecuted blanks on the check form:

> "The thief can use the check to commit fraud even more easily than when forgery of the countersignature is required to make the document usable" (88).

Therefore, in this case the Court of Appeals said—here we have blank papers purporting to be travelers checks; they were never issued; however, since the thief could forge them to look like issued securities they have value. It should be noted, however, that when these alleged checks were found they were not forged; they were still in blank form. Most important there was no charge of forgery in the indictment herein.

It is, therefore, submitted that the Court of Appeals committed error in coming to its decision as aforesaid, and that such error creates a precedent which will in effect vitiate the requirement of value of $5,000 to give federal courts jurisdiction under the National Stolen Property

Act, which is certainly contrary to the intent which Congress had when the Act was passed. It was not congressional intent, nor could it constitutionally be, to punish anticipated, *in futuro*, forgery under the provisions of the National Stolen Property Act.

III.

The verdict of guilty on the conspiracy count, being unsupported by proof, should have been set aside. Failure to do so constituted reversible error.

Count 2 of the indictment charges a conspiracy between the petitioner and Rosenberg and other persons named and unknown, to violate Title 18, U. S. C., Section 415, in that it was part of the said conspiracy that they would transport and cause to be transported, securities of the value of over $5,000, knowing same to have been stolen, from Newark, New Jersey to New York, New York. This count is laid under Title 18, U. S. C., Section 418a*, which provides that if two or more persons enter into an agreement or conspiracy to violate any provision of Sections 413 through 419, of said Title and do any overt act in furtherance thereof, such persons shall be punishable as provided in said Sections 413-419.

The conspiracy count as thus laid is distinguishable from a conspiracy count laid under the provisions of Title 18, Section 88*. The former is not a general conspiracy statute but applies solely to the provisions of the National Stolen Property Act. The latter is general in its scope providing that conspiracy to commit *any* offense against

*There is no section in the recodification which specifically reenacts Section 418a, providing for a ten-year sentence for conspiracy to commit the specific crime charged in Section 415, now Section 2314 of the Revised Code. However, Section 88, the former general conspiracy statute, has been revised and reenacted as Section 371 of the new Title 18 of the Code, and it now provides for a maximum of five years for conspiracy to commit any offense against the United States, with the proviso that punishment for conspiracy to commit a misdemeanor shall not exceed the maximum punishment for such misdemeanor.

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the United States combined with an overt act shall be a crime. It is to be noted that the special conspiracy statute provided for in Section 418a of the Code provides a maximum punishment of ten years imprisonment (*cf.* Section 415) whereas the general conspiracy statute as contained in Section 88 provides a maximum term of imprisonment of only two years. It, therefore, follows that Congress, in enacting the special conspiracy statute entailing a maximum punishment by imprisonment of five times greater than that of the general statute, most certainly intended to define this punishment for a specific conspiracy which involved transportation over state lines as a part of the express agreement of the parties.

The weight of available authority confirms this view, since the cases which discuss the special conspiracy statute under the National Stolen Property Act, and other such special acts, all point to the fact that proof of an express agreement to cross state lines must be adduced in order to convict. This will be pointed out in the discussion of these cases below.

Assuming, *arguendo*, that there was in fact a conspiracy herein, the evidence definitely disclosed that such conspiracy was only between the two conspirators named in the indictment as defendants, namely, the petitioner and Rosenberg. The record discloses that the only other person who dealt with the alleged securities other than the petitioner and Rosenberg was the thief, Cash, who brought said alleged securities to Rosenberg. There is no evidence to show that Cash was a part of any conspiracy. All he did was to dispose of the fruits of his crime by selling them to Rosenberg. What Rosenberg did with them thereafter was no concern of his (*United States* v. *Zeuli*, 137 F. [2d] 845; *United States* v. *DiRe*, 159 F. [2d] 818, affirmed 92 L. Ed. 219, adv. op. No. 6).

The alleged conspiracy therefore resolved specifically to an agreement between the petitioner and Rosenberg.

If the evidence adduced at the trial supports and proves such an agreement in violation of count 2 of the indictment then no error was committed herein. However, it is submitted that the evidence falls far short of proving the charge.

Briefly, if Rosenberg's testimony is to be believed in its entirety, the following occurred: Rosenberg met petitioner *by accident* on 50th Street and Broadway, in the evening of October 28, 1946. A short conference ensued during which Rosenberg stated that he had some money orders and petitioner agreed to see what he could do about it. A telephone call was made from the Hotel Taft to a Humbolt exchange in Newark at 7:17 P. M., that same evening, which presumably was a conversation between petitioner and Rosenberg. Rosenberg testified that the substance of this conversation was that petitioner said he would come over. Although there is evidence that other telephone calls were made, there is nothing in the record to show what the content of conversation was in such calls. It must be presumed since the call was made to Rosenberg and since Rosenberg was a witness at the trial that if there was anything in those telephone calls which would further prove the charges alleged, it would have been brought out. Failure to do so is conclusive that the telephone calls had no relation to the charges in the indictment. Rosenberg further testified that at a later occasion or occasions he met the petitioner again at his home in Newark and that petitioner informed him that he could not do anything with the papers. Petitioner was then arrested with the papers in his possession early in the morning on the 1st of November. Rosenberg's testimony was uncorroborated except that Eleanor Strom testified that she saw him converse with petitioner at 50th Street and Broadway and that she saw petitioner at Newark later that evening. She did not, however, hear the alleged conversations.

From this testimony there is no doubt that Rosenberg and petitioner could be charged and convicted of con-

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spiracy to dispose of the alleged travelers cheques. However, this is not a federal offense. Receiving stolen goods and conspiring to dispose of the same is strictly a state matter, unless the agreement reached specifically involves crossing state lines. Nowhere in the entire record of this case is there any agreement between the alleged co-conspirators to transport the papers involved in interstate commerce.

The fact that petitioner was arrested with the papers in New York is of no probative force in connection with conspiracy count since it is equally consistent with guilt or innocence of the petitioner. Whoever transported the papers may well have conceived his own scheme to take them to New York after he had received them from Rosenberg.

It still takes two or more persons to form a criminal conspiracy. Where one agrees to dispose of stolen property and there is no specific agreement as to the manner or place in which such property is to be taken for disposal, and that person, after receiving the property on his own initiative decides to transport it in interstate commerce, he may be guilty of the substantive offense of transportation, but there would be no conspiracy to transport. Under the facts adduced at this trial, by the government witnesses, it is entirely possible that there was no agreement to transport these securities to New York and that any person who did so transport them acted on his own sole individual initiative.

The circumstances of the alleged travelers cheques being found in New York is not proof of a conspiracy to so transport in interstate commerce. In order to justify the conviction of crime on such circumstantial evidence, it is necessary that the directly proved circumstances be such as to exclude every reasonable hypothesis but that of guilt (*United States* v. *Baker, et al.*, 50 F. [2d] 122, 123; *United States* v. *Russo*, 123 F. [2d] 420, 423)

There is no fetish about a conspiracy charge. It must be proven like any other charge in a case, Rosenberg's testimony is merely to the effect that he asked petitioner if the latter could dispose of certain papers, and that the petitioner told him he would try and see what he could do. This falls far short of an agreement to transport the papers in Interstate Commerce. The Jury found that appellant was not guilty of either transporting these papers or causing them to be transported in Interstate Commerce. It must, therefore, be presumed that the appellant's conviction on conspiracy charge is based on evidence other than that propounded by the Government in support of the substantive offense. There is no other such evidence in this record. The entire indictment thereby falls, as being unsupported by the evidence and should be set aside.

In *United States* v. *Silva*, 131 F. 2d 247, the Court stated on page 249:

> "It was necessary to show that the appellant had agreed to act in concert with someone to commit the substantive crimes charged. * * * There is no magic about a count charging conspiracy. It is simply an accusation of a distinct crime and evidence in support of it must be so clear and convincing as to leave no reasonable doubt. The government merely fails in its proof when its evidence but creates a sort of mystery as to which one guess is as good as another. *Copeland* v. *United States*, 5 Cir., 90 F. 2d 78; *Shannabarger* v. *United States*, 8 Cir., 99 F. 2d 957; *Kassin* v. *United States*, 5 Cir., 87 F. 2d 183. Reversed."

There is considerable authority to the effect that there can be no conspiracy concerning the transportation of stolen articles in Interstate Commerce unless it is under-

stood to be a part of the project that they plan to cross State lines.

U. S. v. *Crimmin* (2nd Cir.), 123 F. 2d 271, 273;
Gable v. *United States,* (7th Cir.) 84 F. 2d 929, 930;
Linde v. *United States* (8th Cir.), 13 F. 2d 59;
Crain v. *United States* (5th Cir.), 148 F. 2d 615, 617, 618.

In the case at Bar, there was no evidence of an agreement to transport across State lines in Interstate Commerce.

In *United States* v. *Penn, et al.,* 131 F. 2d 1021, 1022, the two defendants were charged with conspiring to transport kidnapped persons in interstate commerce. Hhe Court stated:

> "Thus the case at best was no more than that, although they had agreed to kidnap, they had not settled upon any place where they should conceal those kidnapped, and especially that they had not settled that they should take them outside the state. It was necessary for them to agree upon that; Sec. 408c is expliit, it is a corollary of Sec. 408a, which makes it a crime to transport a kidnapped person in interstate commerce. Men do not conspire to do that which they entertain only as a possibility; they must unite in a purpose to bring to pass all those elements which constitute the crime. The accused never went so far as to this vital element of the crime, and an acquittal should have been directed."

In *Crain* v. *United States* (*supra*) wherein the defendants were convicted under an indictment charging conspiracy to transport stolen monies of a value of over $5,000 in Interstate Commerce, a motion for a directed

verdict was made at the close of the evidence. Neither of the appellants took the stand, and no witness testified to knowledge of any agreement between the appellants to transport the stolen money in Interstate Commerce. One of the appellants had left Miami and gone to Minneapolis and the other two were at the point of leaving Miami for other states when arrested. It was held that this did not show an unlawful agreement to transport in Interstate Commerce. The Court of Appeals in reversing the conviction for conspiracy stated at page 617:

> "Interstate Transportation must be involved in the conspiracy to support a conviction. There is no evidence in the record to sustain such a charge."

The case at Bar is no different either factually or legally. It is submitted that the conviction on Count 2, for conspiracy should be set aside.

The Court of Appeals stated that since Rosenberg delivered the checks to petitioner in New Jersey who was rooming in New York that the inference was plain that the conspirators contemplated such transportation (89). In view of the authorities cited herein, it is submitted that the Court could not indulge in such inference. There was no testimony as to any agreement as to where the securities were to be disposed of or that they were in fact to be transported in interstate commerce. It is the present contention that in order to convict under the special conspiracy statute herein and to prove such conviction beyond a reasonable doubt, that an express conspiracy to transport across state lines must be proven. In addition, the inference was just as plain that the petitioner could have disposed of the checks in New Jersey without taking them to his room in New York, which brings us back to the old rule that where there are two hypotheses based upon inference and presumption, one of which leads to innocence and the other to guilt, the doubt must be

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resolved in the petitioner's favor (*United States* v. *Baker*, *supra*, *United States* v. *Russo*, *supra*).

We submit that this court has never passed upon the point that the proof necessary to convict under a special conspiracy statute such as the one involved here must be direct proof of an express agreement to transport across state lines. There must have been some reason for Congress to enact special conspiracy statutes when the general conspiracy statute contained in Title 18, Section 88 would have sufficed. The reason is that under the special statute, such as contained in Title 18, Section 418a, it is a conspiracy to commit a specific type of crime and it follows that the specific species of conspiracy must be expressly proven since there is no federal offense where there is no express agreement to cross state lines. It is still a maxim of law in this country that a defendant cannot be convicted unless it is upon evidence which shows his guilt beyond a reasonable doubt and that he is presumed innocent until proven guilty by the credible evidence at his trial.

The proof necessary to convict under the special conspiracy statutes must necessarily be of an affirmative nature which proves an express agreement to transport in interstate commerce.

IV.

Since petitioner was acquitted on the count charging the substantive offense, his conviction under the count charging conspiracy to commit the substantive offense, being supported at the trial by identical proof, was error, in that it constituted a conviction for a charge which was res judicata and said conviction should have been reversed by the Court of Appeals.

Petti was acquitted on the charge of transporting, or causing to be transported, stolen securities in interstate commerce. It must follow therefrom that he did not either

transport, or even cause the alleged securities to be transported. The Jury, however, found Petti guilty of conspiring to do this.

The entire case, covering the two counts, consisted of a single transaction concerning a package of alleged travelers' checks which the petitioner contended were papers of no value whatsoever.

The evidence introduced by the Government to prove the commission of the offenses alleged in both counts was identical as to each count. Acquittal of the charge of transporting, or causing to transport, securities over the value of $5,000 in Interstate Commerce, therefore, becomes *res adjudicata* of the charge of conspiracy to do so in violation of law. The defendant could not be convicted of conspiracy on the same evidence offered in proof of the substantive charge for which he was acquitted. Where the Government had to rely on the self same evidence in both counts, the acquittal on one was a complete bar to the other.

In *Sealfon* v. *United States*, Vol. 92, Law. ed. 215, adv. op. No. 6, this Court stated at page 217 of the opinion:

> "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *United States*, 328 U. S. 640, 643, 90 L. ed. 1489, 1494, 66 S. Ct. 1180. Thus, with some exceptions, one may be prosecuted for both crimes. Ibid. But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States* v. *Oppenheimer*, 242 U. S. 85, 87, 61 L. ed. 161, 164, 37 S. Ct. 68, 3 A. L. R. 516; *United States* v. *De Angelo* [C. C. A. 3d N. J.] 138 F. 2d 466, 468, annotation in 147 A. L. R. 991; see *Frank* v. *Mangum*, 237 U. S. 309, 334, 59 L. ed. 969, 983, 35 S. Ct. 582)

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and operates to conclude those matters in issue which the verdict determined through the offenses be different. *See United States* v. *Adams*, 281 U. S. 202, 205, 74 L. ed. 807, 808, 50 S. Ct. 269.

Thus the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial."

After determining that the evidence at both trials was identical, the Court stated further on page 218:

> "It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

The fact that the defendant was tried on two counts on one trial is no different than if he had been tried on two separate occasions on two different indictments, where the proof for each indictment was identical.

Each count in an indictment is regarded as if it were a separate indictment. Whether offenses are separately charged in the counts of a single indictment or if they are charged in separate indictments and separately tried, the same rule must hold (*Dunn* v. *United States*, 284 U. S. 390, 393, 76 L. Ed. 356, 358-359).

This is not a case of attempting to reconcile an inconsistent verdict by the Jury. To the contrary, the appellant contends that a Jury having found that he was not guilty of either transporting "securities" or causing them to be transported, thereby disposed of the conspiracy

charge since the adjudication on the substantive charge included any other charge brought against the appellant which the Government offered to prove by the same evidence adduced to prove the said substantive charge.

The Circuit Court held in its opinion that the doctrine of the *Sealfon* case, *supra*, applied only to a situation where there were two separate trials. It is submitted that this was a misapplication of the doctrine and that in view of *Dunn* v. *United States*, *supra*, it makes no difference whether the counts were laid in separate indictments in two separate trials or whether they were laid in one consolidated indictment at one trial. Acquittal on the substantive charge is *res judicata* of the conspiracy charge where both charges are sought to be proved by the same evidence. In view of the rulings in both *Dunn* v. *United States*, *supra*, and *Sealfon* v. *United States*, *supra*, it is submitted that this court should grant certiorari to formalize the rules in both cases so that the courts of the United States may have the benefit of a clear doctrine to apply to criminal cases involving conspiracy. We believe it was the intention of this court to abrogate the practice of jointly charging substantive offenses and conspiracies, if such practice is unwarranted in the evidence, to preclude subjecting defendants to shotgun like indictments, in which, if the charge from one barrel missed the other would hit the target.

CONCLUSION.

For the reasons assigned and the authorities in support thereof, this Court should reverse petitioner's conviction.

Respectfully submitted,

EDWARD HALLE,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 118

ALBERT RALPH PETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 256-261) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 25, 1948 (R. 262). The petition for a writ of certiorari was filed June 24, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the fact that F.B.I. agents, who knew that there was an outstanding warrant for petitioner's arrest, remained in petitioner's hotel room for a few hours in order to effectuate the arrest, invalidates a search incident to that arrest.

2. Whether traveler's checks which bear no purchaser's signature are securities having value within the meaning of the National Stolen Property Act.

3. Whether the evidence is sufficient to support the verdict.

4. Whether petitioner's acquittal on the substantive count necessitates his acquittal on the conspiracy count.

STATUTES INVOLVED

The National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, 18 U.S.C. 413 ff., provides in pertinent part:

> SEC. 2 (b) The term "securities" shall include any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of

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goods, wares, and merchandise; or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise, or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing.

SEC. 3. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both.

The Act of August 3, 1939, c. 413, Sec. 5, 53 Stat. 1178, 1179, 18 U.S.C. 418a, adding Section 7 to the National Stolen Property Act, provides:

> If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.

STATEMENT

An indictment in two counts was returned against petitioner and one Rosenberg in the United States

District Court for the Southern District of New York charging violations of the National Stolen Property Act by the transportation in interstate commerce of stolen securities of the value of more than $5,000 and conspiracy to commit that offense (R. 1B). Petitioner was tried alone, Rosenberg having pleaded guilty. He was acquitted on the substantive count and convicted on the conspiracy count (R. 234). He was sentenced to imprisonment for three years and to pay a fine of $2,500 (R. 248). On appeal, the judgment was affirmed (R. 262).

The instruments which form the basis of the prosecution were 185 American Express Travelers checks, the face value of which totaled $5,400 (Gov. Ex. 2, R. 15; R. 16). Travelers checks are normally signed by the purchaser at the time of purchase and countersigned at the time they are cashed (R. 79-80). The checks involved in the instant case bore no purchaser's signature. The evidence established that they, together with express money order forms, had been stolen from the office of the American Express Company in Atlantic City, New Jersey, during the night of October 25, 1945 (R. 3-4, 28-29). One of the men involved in the theft brought the checks and money orders to Rosenberg in Newark, New Jersey, on October 27, and left them with Rosenberg (R. 29-31, 40-42). On October 28, Rosenberg met petitioner by accident in New York City (R. 20-21, 44). He told

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petitioner about the checks and money orders and told him to come to Newark to get them (R. 45). Late that night petitioner went to see Rosenberg in Newark, and took the checks and money orders, saying, "I will see if I can do anything with them" (R. 46-47). Subsequently petitioner called Rosenberg from New York (R. 48, 154, 156). The checks and money orders were found in petitioner's possession when he was arrested early in the morning of November 1 at the Hotel Taft in New York (R. 85-87, 132-133, 182-184).

During the trial, after the checks and money orders had been received in evidence without objection as to the method by which they had been obtained (Gov. Exs. 2 & 3, R. 15), petitioner's attorney raised a question as to the lawfulness of the search and seizure (R. 89). The judge heard evidence on this issue outside the presence of the jury and held that the checks were admissible (R. 102, 216-221).

The following facts as to the search were established at that hearing and by the testimony of the agents at the trial:

On October 31, 1945, agents of the F.B.I. received information that an individual who "in all probability was Mr. Petti" was living at a room in the Hotel Taft (R. 93). The agents knew that petitioner was sought as a deserter from the army, and that a bench warrant had been issued for him by the federal district court in Newark, New Jersey, on a charge of an O.P.A. violation (R. 100-101). At

about 7:30 p.m. on October 31, four agents went to the Hotel Taft (R. 84, 127, 179). One of the agents called petitioner's room from the hotel lobby, but received no answer (R. 127). Two of the agents remained in the lobby and two others, accompanied by the assistant manager of the hotel, went up to petitioner's room (R. 84, 94, 127). The assistant manager unlocked the door for the agents with a pass key, and then locked the door behind the agents (R. 84, 92-93, 128). The agents ascertained that petitioner was not in the room, and then remained there (R. 84, 93, 127-128). At about 1:30 a.m. petitioner arrived (R. 84, 129). He had not been seen by the agents stationed in the lobby of the hotel (R. 129, 181). Petitioner was arrested and searched, and his room was searched incident to the arrest (R. 85, 130). In the closet of the room the agents found a suitcase (R. 85, 131). Petitioner remarked that if he had known what was going to happen, he would have disposed of the suitcase (R. 85, 106, 132, 183). The agents asked petitioner for the key for the suitcase and he replied that he did not have it. However, among the things the agents had found on petitioner's person was the key. The agents opened the suitcase and found the checks and money orders. (R. 85-87, 106, 131-132, 182-184.)

ARGUMENT

1. Petitioner attacks the validity of the search by which the checks were obtained on the ground that the agents acted illegally in remaining in the room

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after they had ascertained that he was not there (Pet. 7, 8, 10-13). Concededly, however, the agents, who knew of the outstanding warrant, had authority to arrest petitioner (see Rules 4(c)(3) and 9(c), F. R. Crim. P.). Concededly also, the agents had authority to make an entry without petitioner's consent in order to effectuate the arrest. *Lane* v. *United States*, 148 F. 2d 816 (C.C.A. 5), certiorari denied, 326 U. S. 720; *United States* v. *Faw*, 1 Cranch C.C. 487. Since, therefore, the agents had the right to enter petitioner's room, they had the right to remain there until they could accomplish the purpose for which the entry was made, i.e., the arrest of petitioner. They could not be certain of identifying him as he passed through the lobby of so busy a hotel as the Hotel Taft, and, in fact, he was not observed by the agents stationed in the lobby. Had the agents taken up positions in the corridor, petitioner might well have sensed their purpose and endeavored to escape. The surest way to effectuate the arrest was to do what the agents did—remain in the room which they had rightfully entered until petitioner returned.

Beyond this aspect of the case, the validity of the search is, as the court below held, governed by *Harris* v. *United States*, 331 U. S. 145. The nature of the O.P.A. violation for which petitioner was arrested is not spelled out in the record because the trial judge was under the erroneous impression that the nature of the charge was irrelevant (see R. 95,

96). It is significant, however, that petitioner does not deny that his suitcase was a proper object to be searched as incident to his arrest for that crime.[1] And when in that suitcase the agents discovered before their eyes property manifestly stolen, which petitioner in effect admitted he had no right to possess, property which obviously could be used to commit crime, the agents were, we submit, under a duty to take that property in their possession. *Harris* v. *United States,* 331 U. S. at 155.

This case does not present the problem involved in *Trupiano* v. *United States,* No. 427, O.T. 1947, decided June 14, 1948, holding that a search warrant must be obtained when agents have sufficient time and information to obtain one. A search incident to an arrest for the instrumentalities of the crime for which an arrest is made has, historically, been deemed an exception to the rule requiring a search warrant, and has been allowed even where, as here, the instrumentalities of the crime, although generally known, have not been identified with the specificity required for search warrants. As this Court pointed out in the *Harris* case, 331 U. S. at 150-151:

> Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement

[1] The files of the department reveal that petitioner was charged with possession of counterfeit tire replacement certificates. Manifestly, the instrumentalities of such a crime might well be concealed in a suitcase.

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procedures of the United States and of the individual states.

We do not understand the *Trupiano* decision to have changed that rule.

2. Petitioner also contends (Pet. 7, 8, 13-18) that, since the travelers checks did not bear the signature of a purchaser, they were incomplete instruments which are not securities within the purview of the National Stolen Property Act and which have no value.

Section 2(b) of the National Stolen Property Act, defining securities (*supra*, pp. 2-3) specifically mentions travelers checks, and broadly defines securities to include spurious as well as genuine instruments. It is noteworthy that this broad definition was adopted as part of the 1934 act before the 1939 amendment was added punishing the transportation of forged or counterfeit securities without regard to their value.[2] The definition clearly manifests an intent to cover, under the 1934 act, not only genuine obligations and evidences of indebtedness, but also any form of such instruments which, in a practical, rather than a technical sense, could be deemed to have value. Hence, the nice, technical questions as to whether the travelers checks here involved would or would not be absolutely binding against the issuing company (see Note, *Negotiability of Travelers Checks*, 47 Yale L. J. 470), have no

[2] Act of August 3, 1939, c. 413, § 1, 53 Stat. 1178, 18 U.S.C. 415.

relevancy to the question of the coverage of the criminal statute. The checks are certainly securities within the broad definition of the Act. See *Peoples Savings Bank* v. *American Surety Co.*, 15 F. Supp. 911 (W.D. Mich.), holding that travelers checks not signed by a purchaser were securities within the coverage of an insurance policy covering theft of securities.

It is also clear that these securities had value. Only a double signature was necessary to render the checks on their face completely valid instruments. As pointed out in the *Peoples Savings Bank* case, *supra,* it is accepted practice for the issuing companies to make payments on stolen travelers checks to protect the ready negotiability of such instruments. Hence the instruments here involved could be used to obtain the cash value thereof by anyone signing and countersigning them. The court below therefore properly held that the instruments had the face value appearing thereon.

3. Petitioner's contention that the evidence is insufficient to support the verdict on the ground that there was no evidence of agreement between petitioner and Rosenberg to transport the securities across state lines (Pet. 8, 18-25), is without merit. The evidence shows that Rosenberg had the securities in New Jersey, that he told petitioner, who lived in New York, to come to New Jersey to get them, that petitioner obtained the securities in New Jersey at about one o'clock in the morning,

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that he subsequently called Rosenberg from New York, and that the securities were found in New York. Manifestly, the jury had ample justification for inferring that Rosenberg and petitioner understood that petitioner was to come to New Jersey for the purpose of taking the securities to New York to dispose of them. It is, of course, elementary, that the agreement which underlies a conspiracy charge need not be in express words, but may be established by showing a common understanding.

4. There is also no merit in petitioner's contention that his acquittal on the substantive count necessitates his acquittal on the conspiracy charge (Pet. 8, 25-28). The case of *Sealfon* v. *United States,* 332 U. S. 575, on which he relies, furnishes no support for his position. The *Sealfon* case turns on *res judicata,* the issue of whether a subsequent jury will be allowed to find a fact which another jury has previously found to the contrary. It has no application to inconsistencies in the determination of different counts by the same jury. Furthermore, even on the principle of *res judicata,* a finding that a person has not committed the complete offense is not a finding that he has not agreed with another to commit that offense and performed some act in furtherance of that agreement. Although, on the evidence in this case that petitioner had actually transported, as well as agreed to transport, the securities, the verdict may

be inconsistent, it is well established that inconsistency in a verdict does not invalidate it. *Dunn* v. *United States,* 284 U. S. 390, 393.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 28, 1949.

Per Curiam Decision.

No. 118. PETTI *v.* UNITED STATES. Certiorari, 335 U. S. 811, to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The Government having moved the Court to vacate the judgments and remand the case to the District Court for a new trial, the motion is granted, and the judgments of the Court of Appeals and the District Court are vacated and the case is remanded to the United States District Court for the Southern District of New York with directions to grant a new trial. *Edward Halle* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 168 F. 2d 221.